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## STATEMENT OF THE ISSUES

I. This case is moot unless a judgment on the merits would be of some practical value to the Appellant James Littleton. Since James Littleton has been fired in writing by Mayor McAdams and his replacement, Ddonnie Brock, III, has been nominated by the mayor and confirmed by the city council, a judgment that Littleton was wrongly enjoined from acting as the Greenwood City Attorney after he was fired would be of no practical value. Therefore, this case should be dismissed as moot.

II. An appellate court may not grant relief not sought by an Appellant in the trial court. In the trial court James Littleton sought only a judgment from the court denying injunctive and declaratory relief against him. Littleton does not ask this appellate court to vacate the injunctive and declaratory relief granted against him by the trial court. Rather, instead he asks only that this court remand the case to the trial court with instructions to assess attorney's fees and costs against Carolyn McAdams and her attorneys for their allegedly wrongly seeking declaratory and injunctive relief against him in the trial court. This court may not grant the requested relief

III. As a hold-over appointee, James Littleton had no *independent* right by virtue of Miss. Code Ann. §25-1-7 or otherwise to hold-over after being expressly fired by the Mayor from his position as Greenwood City Attorney. Miss. Code Ann. §25-1-7 gives an office holder the right to hold-over only "under the authority given him to hold over." Mayor McAdams' July 6, 2009, letter firing James Littleton as Greenwood City Attorney destroyed any authority he otherwise would have had to hold-over. The declaratory and injunctive relief granted against him was therefore lawful, appropriate and completely within the discretion of the Chancellor to grant

IV. The fact that Appellee used the injunctive process rather than quo warranto or mandamus was, at best, harmless error

[NOTE – APPELLANT RAISES INDIRECTLY OR BY INNUENDO A NUMBER OF ISSUES IRRELEVANT TO THE DECISION OF THIS CASE. NEVERTHELESS, APPELLEE ANSWERS THEM.]

V. Answering Appellant's irrelevant arguments

A. Irrelevant point one: This Lawsuit Was Not Racially Motivated;

B. Irrelevant point two: Willie Perkins' entire argument is grounded on the proposition that the intent in filing this lawsuit was forcing the defendants to compromise with the Mayor on a choice for City Attorney. Mr. Perkins has twisted and contorted the argument of counsel to suit his own needs rather than giving it a fair reading. The Mayor's counsel argued that under the republican form of government on which Greenwood's government is based, power is diffused between the three branches of government in order to compel the

legislative to compromise rather than dictate to the executive; and, that if this court were to support an independent right in James Littleton to hold over, it would upset this delicate balance of power; and,

C. Irrelevant point three: The Council Members From Wards 3, 4, 5, 6, and 7 were sued because they claimed that James Littleton, regardless of the fact that the Mayor had sued him, had a right personal to him to holdover. The Council Members from Wards 1 and 2 were not sued because they agreed with the Mayor that after the Mayor had fired James Littleton, he had no right, personal to him or otherwise, to hold over

## STANDARD OF REVIEW

As to questions of fact, an appellate court will not disturb the findings of a Chancellor when supported by substantial evidence unless the chancellor abused his discretion, applied an erroneous legal standard, was manifestly wrong, or was clearly erroneous. *Stanley v. Miss. State Pilots of Gulfport, Inc., 951 So.2d 535, 538 (Miss. 2006); and, Williams v. Williams, 843 So.2d 720, 722 (Miss. 2003).* Questions of law are reviewed *de novo. Cummings v. Benderman, 681 So.2d 97, 100 (Miss. 1996).*

## STATEMENT OF THE CASE

A. Course of The Proceedings Below

On July 20, 2009, the Appellee, Carolyn McAdams, filed her Complaint seeking declaratory and injunctive relief. Specifically, she sought a declaratory judgment against *both* Appellant Littleton and the City Council members supporting a purported right in Littleton, independent of the Mayor's authority to fire him, to hold over until his replacement had been appointed by the Mayor and consented to by the Council. Specifically, she sought a declaratory judgment declaring:

1. That Carolyn McAdams had terminated James Littleton as the City Attorney for the City of Greenwood and that when she did so, she was acting within her lawful authority as the Mayor of the City of Greenwood;

2. That James Littleton no longer held the office of Greenwood City Attorney;

3. That the office of Greenwood City Attorney was then vacant;

4. That, in the absence of a nomination by Mayor Carolyn McAdams of James Littleton to serve as the Greenwood City Attorney, the Greenwood City Council had no authority, statutory or otherwise, to hire James Littleton to act as City Attorney for the city of Greenwood;

5. That the Greenwood City Council had no authority, statutory or otherwise, to hire James Littleton as an attorney to represent and/or advise the Greenwood City Council or members of the Greenwood City Council acting in their official capacities as member(s) of the Council; and,

6. That the Greenwood City Council had no authority, statutory or otherwise, to hire James Littleton to represent or advise the city council under the guise of hiring him as a Clerk or Assistant Clerk for the Council.

*Mayor McAdams did not seek injunctive relief against the Council members.* She did however seek injunctive relief against Mr. Littleton asking the Court to enter an injunction:

1. Enjoining James Littleton from attending meetings of the Greenwood City Council and purporting to act as the Greenwood City Attorney;

2. Enjoining James Littleton from attending meetings of the Greenwood City Council and purporting to act as the attorney for the Greenwood City Council, or any member of the Council acting in that person's official capacity as an elected member of the Greenwood City Council;

3. Enjoining James Littleton from purporting to act as the City Attorney for the City of Greenwood in any circumstances or before any tribunal, judicial, administrative or otherwise;

4. Enjoining James Littleton from purporting to any court, agency, institution, member of the press, any member of the public or the public generally that he was the city attorney for the City of Greenwood;

5. Enjoining James Littleton to, within twenty-four (24) hours of the trial court's Order, deliver to the office of the mayor either the original files or complete copies of all files in which there was ongoing work, in or out of court, or otherwise;

6. Enjoining James Littleton to, within twenty-four (24) hours of the trial court's Order, file with all courts and administrative agencies in which there was ongoing litigation or proceedings in which he had formerly represented the interests of the City of Greenwood, a motion seeking leave to withdraw from representing the City and advising the court or agency that his authority to represent the city had been terminated by the Current Mayor, Ms. Carolyn McAdams, and that no new City Attorney had, as of the date of the filing of the motion, been appointed and confirmed, and also asking the court or agency to stay all proceedings for a period

of sixty (60) days to allow the city to obtain new counsel to represent it;

7. Enjoining James Littleton to, within twenty-four (24) hours of the trial court's Order, in all matters in which litigation was not involved but which had ongoing proceedings or activities, send a letter to all other parties involved advising such parties that his authority to represent the city had been terminated by the current Mayor, Ms. Carolyn McAdams, and that no new City Attorney had, as of the date of his letter, been appointed and confirmed, and also asking such other parties to stay all proceedings or activities for a period of sixty (60) days to allow the city to obtain new counsel to represent it; and,

8. Enjoining James Littleton to, within seven (7) calendar days of the trial court's order, to deliver to the Mayor's office either the original file or an exact copy of all the contents thereof of all files which he had in his possession for any matter in which he had represented the City of Greenwood in matters which were no longer on-going and thus not covered by number 5 above. (Rec. 8-11)

On August 14, 2009, Appellant Littleton filed his response in opposition to the Mayor's complaint for declaratory and injunctive relief. (Rec. 104-116). Mr. Littleton's position was and is that *Miss. Code Ann.* §25-1-7 gave him, *personally*, as the Greenwood City Attorney, appointed and approved by the previous Mayor defeated in the election, the unfettered right to hold over and continue to act as the City Attorney for the City of Greenwood, regardless of what the newly elected Mayor may or may not have wanted; and to hold-over until such time as his successor had been appointed by the Mayor and approved by the City Council. That is to say, his *right* to hold-over *trumped* the right of the Mayor to fire him.

A hearing was held on the matter on August 17, 2009. The trial court entered its Opinion and Order on August 26, 2009, in which he held in favor of Mayor McAdams and against the

Appellant, James Littleton.

Specifically, the Court said:

> "The Court does hereby find that Mayor McAdams, by her letter of July 6, 2009, lawfully terminated the tenure of James K. Littleton, III as the City Attorney for the City of Greenwood and that she possessed the legal authority to do so.
>
> Consequently, the court does hereby order that Attorney James K. Littleton, III no longer holds the office of City Attorney for the City of Greenwood, Mississippi, and is hereby ordered and directed to immediately cease and desist from purporting to act as the City Attorney for the City of Greenwood, Mississippi in any circumstances or before any tribunal, judicial, administrative or otherwise." (Rec. 131)

James Littleton filed his Notice of Appeal *Pro Se* on September 24, 2009. (Rec. 133).

B. Post-Script To The Course of Proceedings Below

This appeal represents only half this dispute. While granting Mayor McAdams' request for declaratory and injunctive relief against James Littleton, the Chancellor also denied the request for declaratory relief against the five City Council Member defendants. (Rec. 132)

The Council Members then sought Rule 11 sanctions against McAdams and her attorneys which the Chancellor denied by Order entered on July 15, 2010. The denial of sanctions has been appealed and is currently pending before this Court as Case No. 2010-TS-01333. This Court entered its Order on September 7, 2010, denying the motion of Mayor McAdams to consolidate these two appeals.

These two appeals thus remain completely separate. The important point for the Court to realize, therefore, in deciding this Appeal, Case No. 2009-CA-01197, is *there is absolutely no question before the Court in this case dealing with the issue of Mayor McAdams request for declaratory relief against the Council members.*

C. Statement of The Facts[1]

The defendant, Littleton, was appointed to serve as the City Attorney for the City of Greenwood by the City's former mayor, Hon. Sheriel Perkins.[2] Littleton's term of office expired with the term of the Mayor appointing him, Mayor Perkins. When the term of Mayor Perkins ended, she was followed in office by the Appellee, Hon. Carolyn McAdams. Mayor McAdams' term as Mayor began on or about July 6, 2009.

Following McAdams taking office, Appellant Littleton continued to serve as a hold-over appointee pursuant to the authority for him to do so under *Miss. Code Ann. §25-1-7.* Under these statutes Defendant Littleton was authorized to continue to serve as a holdover appointment, ***unless specifically terminated by the Mayor***, until his successor had been nominated by the Mayor and approved by the Council.

On or about July 6, 2009, the Plaintiff, Mayor McAdams, served on the Defendant, James Littleton, specific written notice that she was terminating him as the Greenwood City attorney effective immediately.

Notwithstanding the mayor's express termination of Mr. Littleton, at the next Council meeting held on or about July 7, 2009, Mr. Littleton attended and purported to continue to act as the Greenwood City Attorney. He further announced his intention to those assembled and the world at large that, regardless of what the Mayor might prefer, he was going to continue to serve as the Greenwood City attorney unless and until his successor had been appointed by the Mayor and approved by the Council. In fact he went so far as to announce the Council could not

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[1] This Statement of Facts is found in the Record at 44-46.

[2] Ms. Perkins is the wife of Littleton's attorney on this appeal, Hon. Willie Perkins, Sr.

function without his assistance and presence at their meetings.

At this same Council meeting the remaining five defendants voted to turn down the Mayor's nomination of the law firm of Abraham & Rideout to serve during the upcoming year as the city attorney for the city of Greenwood and further announced they were satisfied with Defendant Littleton and, at a minimum, implied by their silence that as a holdover he could continue to serve until his successor had been appointed by the Mayor and approved by the Council. (See the Record on Appeal at pages 44-46.)

As noted by Counsel for Mr. Littleton in his brief,[3] Donnie Brock, III, was eventually nominated by Mayor McAdams to fill the position of Greenwood City Attorney. Subsequently, the City Council voted to confirm Mr. Brock's nomination and he is now the serving Greenwood City Attorney.

## SUMMARY OF APPELLEE'S ARGUMENT

On this appeal James Littleton is aggrieved because he was fired by the Mayor of the City of Greenwood as attorney for the city. His replacement, Donnie Brock, III, has been nominated by the Mayor and confirmed by the City Council. A judgment that Littleton was wrongly enjoined from acting as Greenwood's city attorney after he had been fired would be of no practical value. Therefore, this case is moot and should be dismissed. Likewise, Littleton cannot shoehorn himself in the "capable of repetition yet evading review" exception to mootness because there is no likelihood that he will ever be subject to the same action again, viz. - fired by McAdams as City Attorney.

At the trial level the only relief sought by Mr. Littleton was a dismissal of Mayor

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[3] See Appellant's Brief served on July 13, 2010, at footnote 3 on page 19.

McAdams' complaint seeking declaratory and injunctive relief against him. On appeal he asks the Court to remand the case for an assessment of damages under Miss. R. Civ. P. 65(c). The case must be dismissed because it is fundamental that a trial court will not be reversed for failing to grant relief which was not requested from the trial court.

As a hold-over appointee, James Littleton had no independent right by virtue of Miss. Code Ann. §25-1-7 or otherwise to hold-over after being expressly fired by the Mayor from his position as Greenwood City Attorney. Miss. Code Ann. §25-1-7 gives an office holder the right to hold-over only "under the authority given him to hold over." Mayor McAdams' July 6, 2009, letter firing James Littleton as Greenwood City Attorney destroyed any authority he otherwise might have had to hold over. The declaratory and injunctive relief granted against him was therefore lawful, appropriate and completely within the discretion of the Chancellor to grant.

Over the years the appointment and confirmation of the Greenwood City Attorney has been litigated in front of three different courts and been the subject of at least four separate Attorney General opinions. A synthesis of the holdings in all of this litigation creates a rule of reason. The rule is that an appointee may "hold-over" but there must be some "authority" for the hold-over. In this case there was no "authority" after the Mayor fired James Littleton.

The Mayor met her burden of proof for the granting of injunctive relief:

(a) There was a substantial likelihood she would prevail on the merits in that it was clear that as Mayor she had the sole power to appoint and discharge appointees and it was likewise clear that the Council had no authority to force her to work with a city attorney she did not want to work with;

(b) If the Appellant, Littleton, had been allowed to have continued to represent to the world that he remained the city attorney for Greenwood, the Mayor would have

suffered irreparable harm in that her exclusive right of appointment would have been nullified and the City of Greenwood would have suffered irreparable harm by someone purporting to act for the City who had no lawful authority to so act;

(c) No harm would have befallen the City of Greenwood by preventing Appellant Littleton from acting for the City in the clear absence of any authority to so act. Therefore, the threatened and continuing irreparable injury occasioned by allowing Littleton to continue to act for the City in the absence of authority to do so clearly outweighed the threatened harm a restraining order might have caused; and,

(d) Granting the temporary restraining order and injunctive relief did not dis-serve the public interest. In fact, it served the public interest.

Littleton argues that he was not a department head and that therefore under Miss. Code Ann. §21-8-23(3) the Mayor had no authority to terminate his employment. Based on this he makes the erroneous conclusion that therefore he was granted the authority under §25-1-7 to hold over regardless of what the newly elected mayor might want. This is clearly not the case. While §25-1-7 gives an appointee the right to hold over, the right exists only "*under the authority given him to hold-over.*"

It is clear that Appellant Littleton had no personal right independent of the Mayor, to hold-over regardless of the Mayor's wishes. Therefore any error in reasoning by the Chancellor in reaching this conclusion as well as any error which may have occurred by choosing to reach this conclusion by injunctive relief rather than using mandamus may have been technical error but was not reversible error. To be reversible Appellant must be able to show not only error, he must show prejudice to his rights caused by the error. A man cannot be prejudiced in denying

him a right which he did not have to begin with.

Appellant makes a number of arguments in his brief which are irrelevant but which Appellee is nevertheless compelled to respond to. Littleton's innuendo (argument) that the lawsuit was racially motivated is simply a politically incorrect play of the "race card" and has no merit.

The second irrelevant argument which is also without merit is the innuendo (argument) made by Appellant Littleton that the sole purpose of the filing of the suit was to force the Council to consent to the Mayor's choice for a City Attorney. This is a gross distortion of the argument made by the trial court on behalf of Mayor McAdams. The argument made to the trial court was that under the Republican form of government on which Greenwood's government is based, power is diffused between the three branches of government in order to compel the legislative to compromise rather than dictate to the executive; and, that if the trial court were to support an independent right in James Littleton to hold over, it would upset this delicate balance of power.

## APPELLEE'S ARGUMENT

### POINT I.

THIS CASE IS MOOT UNLESS A JUDGMENT ON THE MERITS WOULD BE OF SOME PRACTICAL VALUE TO THE APPELLANT JAMES LITTLETON. SINCE JAMES LITTLETON HAS BEEN FIRED IN WRITING BY MAYOR McADAMS AND HIS REPLACEMENT, DONNIE BROCK, III, HAS BEEN NOMINATED BY THE MAYOR AND CONFIRMED BY THE CITY COUNCIL, A JUDGMENT THAT LITTLETON WAS WRONGLY ENJOINED FROM ACTING AS THE GREENWOOD CITY ATTORNEY AFTER HE WAS FIRED WOULD BE OF NO PRACTICAL VALUE. THEREFORE, THIS CASE SHOULD BE DISMISSED AS MOOT

The mootness doctrine, as expounded by this Court is –

> "This Court cannot entertain an appeal where there is no actual controversy....If an appeal involves questions about rights which no longer exist, the appeal will be dismissed....This Court's review should not be allowed for the purpose of settling abstract or academic questions, and this Court has no power to issue advisory opinions." Gartrell v. Gartrell, 936 So.2d 915, 916 (Miss. 2006).

There is however an exception to the mootness doctrine, "capable of repetition yet evading review." In this case –

> "There are two qualifiers to finding that a moot appeal is capable of repetition yet evading review (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration and (2) there was a reasonable expectation that ***the same complaining party*** would be subject to the same action again." Koestler v. Koestler, 976 So.2d 372, 379 (Miss. App. 2008) (emphasis added)

The Appellant, Mr. Littleton, cannot meet the exception's second criterion. There is no likelihood that he will ever be subject to the same action again. That is to say, the chances are zero that: (1) Mayor McAdams will leave office either voluntarily or by losing an election; (2) Some future Mayor will appoint Mr. Littleton as Greenwood City Attorney; (3) Carolyn McAdams will then run and be re-elected Mayor; and, (4) Even though James Littleton will claim the right to hold-over, the newly elected Mayor McAdams will fire him again.

For this reason the appeal should, without a doubt, be dismissed as moot. In fact Mr. Perkins in his brief admits the issue is moot. As he says, "This finding[4] by this Court cannot undo the harm caused to Appellant because the city attorney vacancy has been filled." (See Appellant's brief at 19).

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[4] The finding urged by Mr. Perkins that the lower court erred in issuing an injunction against Mr. Littleton's further service as City Attorney after being fired by Mayor McAdams.

POINT II.

AN APPELLATE COURT MAY NOT GRANT RELIEF NOT SOUGHT BY AN APPELLANT IN THE TRIAL COURT. IN THE TRIAL COURT JAMES LITTLETON SOUGHT ONLY A JUDGMENT FROM THE COURT DENYING INJUNCTIVE AND DECLARATORY RELIEF AGAINST HIM. LITTLETON DOES NOT ASK THIS APPELLATE COURT TO VACATE THE INJUNCTIVE AND DECLARATORY RELIEF GRANTED AGAINST HIM BY THE TRIAL COURT. RATHER, INSTEAD HE ASKS ONLY THAT THIS COURT REMAND THE CASE TO THE TRIAL COURT WITH INSTRUCTIONS TO ASSESS ATTORNEY'S FEES AND COSTS AGAINST CAROLYN McADAMS AND HER ATTORNEYS FOR THEIR ALLEGEDLY WRONGLY SEEKING DECLARATORY AND INJUNCTIVE RELIEF AGAINST HIM IN THE TRIAL COURT. THIS COURT MAY NOT GRANT THE REQUESTED RELIEF.

The Appellant, James Littleton, did not seek an award of costs, attorney's fees and/or damages in the trial court. For relief he asked only that the trial court deny Carolyn McAdams' request for declaratory and injunctive relief removing him as City Attorney in accordance with her letter firing him.[5]

Because a new City Attorney, Donnie Brock, III, has been nominated by the Mayor and approved by the City Council,[6] Littleton admits that this court can grant no relief which would be of practical benefit to him. So as not to go away empty handed, Littleton now shifts gears and instead asks this Court to remand the case to the trial court with instructions to award Mr. Littleton damages under M.R. Civ. P. 65(c) which "allows a person wrongfully enjoined to

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[5] See his initial response in the Record at Rec. 116 and his supplemental response in the Record at Rec. 124.

[6] See footnote 3 of James Littleton's Appellant's Brief where he says, "There may not be any document on appeal before this Court to substantiate the fact that Attorney Donnie Brock, III is the appointed city attorney for Greenwood, MS. As such, Appellant's counsel submits this fact as an officer of the court." The Appellee, Carolyn McAdams, through counsel, agrees and stipulates that this is a correct statement of fact by Mr. Littleton and his counsel, Hon. Willie Perkins, Sr.

recover fees and damages."[7]

It is first year law student "horn book" law that an appellate court may not grant relief which was not asked for by Appellant in the trial court. Chase v. State, 645 So.2d 829, 846. (Miss. 1994) ("A trial court cannot be put in error on a matter not presented to the court for decision."); Taylor v. State, 754 So.2d 598, 606 (Miss. App. 2000) ("It is fundamental that the trial court will not be reversed for failing to grant relief that was not requested."); and, *In re* D.O. and T.O, *Minors*,798 So.2d 417, 421 (Miss. App. 2001) ("It is fundamental that a trial court will not be reversed for failing to grant relief that was not requested.").

While, as more fully discussed below, James Littleton is entitled to no relief on the merits, for the sake of argument even if this Court were to assume that the trial court wrongly granted declaratory and injunctive relief against him, he is still entitled to no relief in this Court. The only relief which he sought in the trial court is now moot. Because he did not ask the trial court for the relief he now seeks, it is clear beyond cavil that this Court cannot grant James Littleton an award of attorney's fees, costs and damages under M.R. Civ. P. 65(c).

POINT III.

AS A HOLD-OVER APPOINTEE, JAMES LITTLETON HAD NO *INDEPENDENT* RIGHT BY VIRTUE OF MISS. CODE ANN. §25-1-7 OR OTHERWISE TO HOLD-OVER AFTER BEING EXPRESSLY FIRED BY THE MAYOR FROM HIS POSITION AS GREENWOOD CITY ATTORNEY. MISS. CODE ANN. §25-1-7 GIVES AN OFFICE HOLDER THE RIGHT TO HOLD-OVER ONLY "UNDER THE AUTHORITY GIVEN HIM TO HOLD OVER." MAYOR McADAMS JULY 6, 2009, LETTER FIRING JAMES LITTLETON AS GREENWOOD CITY ATTORNEY DESTROYED ANY AUTHORITY HE OTHERWISE WOULD HAVE HAD TO HOLD-OVER. THE DECLARATORY AND INJUNCTIVE RELIEF GRANTED

[7] See Appellant's July 13, 2010, brief at page 19.

AGAINST HIM WAS THEREFORE LAWFUL, APPROPRIATE AND COMPLETELY WITHIN THE DISCRETION OF THE CHANCELLOR TO GRANT[8]

"JORDAN I"

The Facts Leading Up To This Litigation

Prior to July 1, 1985, the City of Greenwood operated under the Commission form of government pursuant to *Miss. Code Ann. §21-5-1* through *§21-5-23 (1972).* On July 1, 1985, the City adopted the Mayor-Council form of government pursuant to *Miss. Code Ann. §21-8-1* through *§21-8-47 (1972).* Under this system Greenwood continued, pursuant to ordinances adopted in 1985, to appoint the City Attorney and municipal court personnel subject to council confirmation.

Louis Fancher was elected mayor in 1985 for a four year term. During this period, municipal court personnel and the City Attorney were selected on an annual basis through mayoral appointment subject to council confirmation. In 1989 Fancher was re-elected to serve another four year term.

Prior to June 1991 Lee Abraham had served as City Attorney based on annual appointments. In June 1991 Fancher appointed Abraham for another one year term to run from July 1, 1991, through June 30, 1992, and the Council rejected Abraham's appointment. Pursuant to an Attorney General's opinion that Abraham could serve as interim city attorney until a permanent city attorney could be appointed, the council passed a resolution allowing Abraham to remain as interim city attorney until August 20, 1991. Fancher vetoed the resolution and Abraham resigned as city attorney on August 27, 1991. The city council denied Abraham's

[8] The following argument was the same as made before the Chancellor. See the Record at pages 30 through 53.

proposal that he be allowed to continue to work on pending court cases.

On September 10, 1991, the council passed a resolution appointing Willie Perkins [Counsel for Appellant in this case] as the City Attorney. In response, Fancher issued an Executive Order appointing, without council confirmation, Luke Schissel as City Attorney.

The First Trip To Chancellor Barnwell

On September 11, 1991, Fancher filed a complaint for a declaratory judgment and a temporary restraining order in the Leflore County Chancery Court against the members of the Council. The TRO application claimed that pursuant to the Mississippi Code, Fancher, as Mayor, was vested with the exclusive authority and power to appoint the city attorney and municipal court personnel without council approval.

A Detour To The District Court

The Council, on September 12, 1991, removed the case to the U.S. District Court for the Northern District claiming that Fancher's actions violated §5 of the *1965 Voting Rights Act* as well as the Fourteenth and Fifteenth Amendments. On November 5, 1991, the District court issued its opinion that there had been no violation of the *Voting Rights Act* reasoning that although Fancher may have attempted to appoint a city attorney without council approval, the council exercised its right to participate in the confirmation process by expressly denying the confirmation and compensation to the mayor's appointee. Thus, the district court opined, a city attorney had never actually been appointed and there was no "change" which was a necessity for a §5 violation.

The Second Trip To See Judge Barnwell

On November 8, 1991, Chancellor Barnwell, recognizing that a *impasse* existed between the Mayor and the Council, approved the appointment of Schissel as interim City Attorney. On

February 7, 1992, the Chancellor issued his final opinion holding that under the Mississippi mayor-council form of government, Mayor Fancher had the exclusive power and authority to employ the city attorney and municipal court personnel.

Chancellor Barnwell reasoned that the phrase "governing authorities" was "generic." He said that reading the appointment statutes in conjunction with the Mayor-Council form of government statutes, the term "governing authorities" meant the Mayor. The Chancellor also held that Fancher's action in appointing Schissel as city attorney without Council confirmation did not constitute a change under §5 of the Voting Rights Act. Feeling aggrieved by the Chancellor's decision, the Council appealed.

The Supreme Court's Decision

The Mississippi Supreme Court in an opinion written by Justice Fred Banks and concurred in by Justices Prather and Roberts reversed the Chancellor's decision to the extent the Chancellor held that the mayor could appoint a City Attorney without the necessity of submitting the appointment to the Greenwood City Council for its approval. It is important however to understand the basis of the Court's opinion.

The Banks-Prather-Roberts Plurality Opinion

The court did not hold that under the Mayor-Council form of government the Council has the inherent right to approve or disapprove the mayor's appointment. Its holding was twofold.

First, it held that the exclusive right to make the appointment belonged to the mayor as the Chief Executive. Second, it held that the City of Greenwood had adopted a city ordinance which gives the Council the role of "advice and consent" as to the city attorney and that this ordinance was not "inconsistent" with the Mayor-Council form of government. As Justice Banks said:

> "While the city council has no authority to appoint, nothing in our statutes or precedents denies the council an advice and consent role in the appointive process. In such circumstances, the governing authorities of Greenwood were free to adopt the ordinances here questioned....
>
> We hold that the ordinance duly adopted by the City of Greenwood requiring that legal officers...should be appointed subject to council approval is not inconsistent with the statutory requirement that executive authority be vested with the mayor in the mayor-council form of government. *Jordan v. Smith, 669 So.2d 752, 757 (Miss. 1996).*

Finding that the council had no authority to appoint a city attorney and should disapprove a mayoral appointment only upon good cause, Justice Banks went on to say:

> "Nothing said here is intended to sanction the city council assuming any right to initiate an appointment. We approve only an ordinance duly adopted applying the confirmation power to the municipal officers here involved. Confirmation should not be withheld without good cause." *Id.*

The Pittman-Sullivan Concurring Opinion

Justice Pittman wrote a concurring opinion which was joined in by Justice Sullivan. In it Pittman reached the same conclusion as Banks that the Mayor has the sole authority to make the appointment and council has a right of advice and consent only because of the ordinance which had been adopted by the council. Justice Pittman said:

> "I am of the opinion that under the mayor-council form of government *it is exclusively the mayor's prerogative to make appointments* not specifically prescribed by statute....We have held that *appointments are a function of the executive branch*, therefore, the mayor in a mayor-council form should make the appointment....Although the statute vests the executive power in the mayor and thus the appointment power, an advise and consent ordinance does not in any way violate a state statute or the State Constitution. Greenwood, by it's own acts, properly adopted such an ordinance in 1989 and now it must abide by it." Jordan v. Smith, *supra.*, 669 So.2d at 765. (emphasis added)

Also like Banks, Justice Pittman reached the same conclusion that the Council had no authority to appoint a city attorney and it should not withhold approval of the mayor's choice except for "good cause." Thus, Pittman said:

> "However, *Miss. Code Ann. §21-8-27 expressly prohibits the council from dictating or directing to the mayor the appointment of persons to office.* The resolution on September 10, 1991, by the Greenwood City Council wherein it attempted to appoint a city attorney is clearly in violation of this statute and the statute vesting executive power in the mayor. Confirmation must not be unduly withheld and as stated in the majority opinion, confirmation should be withheld only on the basis of good cause." *Id.* (emphasis added)

The Lee-McRae-Smith Dissent

Justice Dan Lee wrote a dissent which was concurred in by Justices McRae and Smith.[9] Justice Lee was of the opinion that Mayor Fancher had the right to appoint a city attorney with or without Council's approval. He was of the further opinion that the majority's decision would allow a Council to hold a mayor hostage until the Mayor appointed a city attorney satisfactory to the council. Specifically, Justice Lee said:

> "[T]he majority opinion gives the city council the unbridled power to amend its governing statutes at will and in the process nullify positive Mississippi statutory law which requires that the mayor exercise the executive power and the city council exercise the legislative power in the mayor-council form of municipal government. I find no legal authority, constitutional, statutory or case law, that allows the city council in the mayor-council form of government to usurp the mayor's power to appoint the city attorney....The practical effect of today's majority opinion is that a city council in the mayor-council form of municipal government will be able to withhold its self-proclaimed power of 'advice and consent' over the mayor's appointments until the mayor relents and appoints the city attorney...selected by a majority of the city council. This effectively strips the mayor of his statutorily vested

[9] The only justice on the nine member court not participating in the decision was Justice Mike Mills.

> executive power to appoint the city attorney....Further, I believe that today's majority opinion will lead to a waste of judicial resources through repeated trips to court by disgruntled mayors and city councils litigating whether or not the city council is wrongfully withholding its newly appropriated power of consent as to mayoral appointments for city attorney....' " Jordan v. Smith, *supra.*, 669 So.2d at 759.

WHAT IS CLEAR FROM "JORDAN I"

Jordan I makes the following points clear:

1. The mayor, in the mayor-council form of local government, has the sole power to choose the person to be nominated for City Attorney. The city council has no authority to make the choice as to who is nominated.

2. Unless it has "good cause" the city council may not withhold its approval of the mayor's nomination.

THE FOLLOW-UP TO "JORDAN I"

The only case which could be considered a follow-on would be *DuPree v. Carroll, 967 So.2d 27 (Miss. 2007).* *DuPree* involved Hattiesburg which has the same mayor-council form of government as Greenwood. The issue in *DuPree* was whether the Mayor, Johnny DuPree, who had been elected to a second four year term was required to re-submit the names of his department heads for approval by the council when he wanted to keep the same persons whose names had been submitted and approved by the council during his first term in office.

*DuPree* was in front of a three judge panel which included Justices Diaz, Carlson and Randolph. Diaz wrote the opinion which was concurred in by Justices Smith, Waller, Carlson, Graves, Dickinson, Randolph and Lamar. Easley concurred in the result only.

The *DuPree* court did not discuss and, in fact, did not even cite *Jordan v. Smith*. The mayor's obligation to submit his nominations to council was not contested. "The parties do not

dispute that a mayor cannot unilaterally hire directors without the approval of council." *DuPree v. Carroll, supra., 967 So.2d at 30.*

Finding that the mayor *did* have to re-submit his department heads for the council's approval, the *DuPree* court said:

> "The statute clearly vests in the council checks and balances on the executive powers of the mayor. A plain reading of the statute supports the conclusion that 'the term of office' is to be read in the singular, meaning that a director, once confirmed, serves only for the term of the mayor nominating him....[T]he council members who originally confirmed the nomination of a director may no longer be on the council at the beginning of the new term....An interpretation which allowed those council members who were present when a mayor first took office to have greater powers than those council members present at the beginning of the new term of office would subvert the statutory scheme." *DuPree v. Carroll, supra., 967 So.2d at 31.*

HOLD-OVER APPOINTEES

*Miss. Code Ann. §25-1-7 (1972)*, in pertinent part, provides as follows:

> "If any person...appointed to any...municipal office shall fail to qualify...on or before the day of the commencement of his term of office, or for any cause such officer shall hold over after his regular term of office expires ***under the authority given him to hold over*** until his successor is appointed...and qualified, a vacancy in such office shall occur thereby and it shall be filled in the manner prescribed by law...." (emphasis added)

After the Supreme Court's decision in *Jordan v. Smith, supra.*, the AG's office gave an opinion to Luke Schissel that the individuals who were the Greenwood City Attorney and/or municipal judicial officers at the time the Supreme Court handed down its decision, and who had not been confirmed by the Council would, under *§25-1-7*, be "holdover employees until either they or their successors are appointed and confirmed by the city council." *Op. Atty. Gen. No. 96-0088, Schissel, Mar. 6, 1996.*

[NOTE – There are a number of Attorney General Opinions cited by both Appellee and Appellant. It was unclear to Appellee whether AG's opinions are treated as authority or evidence. Apparently AG opinions are treated as authority as this Court considers them on appeal even if not cited before the trial court. State ex rel Holmes v. Griffin, 667 So.2d 1319, 1326 (Miss. 1996). "An Attorney General's opinion is entitled to careful consideration and regarded as persuasive; however, it is not binding upon the court considering the same question of law." McGhee v. Johnson, 868 So.2d 1051, 1053 (Miss. App. 2004).]

Two weeks later Greenwood City Councilman David Jordan got another AG's opinion providing that a holdover office holder could not continue to hold over after that person's reappointment had been submitted to the council and turned down. This opinion provides:

> "that once the city council rejects the reappointment of any individual presently holding over in a municipal position, that particular individual may not continue to act as a hold over city employee in that position....The mayor in a mayor-council city may not circumvent the intent of this statute by continuing to present the same names for reappointment or appointment to the city council once the city council has decided to reject those particular individuals....After the city council votes to reject any appointees made by the mayor, those appointees may not continue to hold over in the appointed positions. Those appointed positions are from that point forward vacant until the mayor presents new names to the city council for confirmation and until the city council confirms any such appointments made by the mayor." *Op. Atty. Gen. No. 96-0190, Jordan, Mar. 22, 1996.*

Six months later Greenwood Mayor Harry Smith asked the AG whether the City Council could simply refuse to vote on his appointments in order to allow the employee whose term had expired to hold over indefinitely. The AG concluded that –

> "the intent of this statute may not be circumvented by the refusal of a city council to vote either to reject or confirm an appointee, once the mayor has presented a new name to the city council, in order to allow an indefinite hold-over by the employee whose term has

> expired....The appointments made by the mayor...once presented to the city council, are before the city council and are subject to a vote of rejection or approval....If the city council refuses to take action, such a refusal to vote amounts to a rejection of the appointments by the council. *Op. Atty. Gen. No. 96-0490, Smith, Sep. 20, 1996.*

Two years later Greenwood City Attorney Billy Bowman asked the AG for an opinion as to whether the council could have an appointee hold over indefinitely by simply "tabling" the mayor's nomination. In saying that the council could not hijack the process in this manner, the AG said:

> "[W]e are of the opinion that while a vacancy exists, the incumbent in this case may hold over. The City Council has a responsibility to make an *objective determination of the qualifications* of any individual recommended by the Mayor without undue delay. Again, any refusal to act, including the act of 'tabling' a nomination, amounts to a rejection. Any rejection of an individual is subject to judicial review to determine whether said rejection constitutes an abuse of discretion as discriminatory, arbitrary, capricious or unreasonable." *Op. Atty. Gen. No. 2001-0647, Bowman, Oct. 19, 2001.* (emphasis added)

In a 2006 AG's opinion to the Mayor of Hattiesburg who questioned whether it was necessary for him to resubmit his appointments at the beginning of his second four year term when he did not wish to change any department heads, the AG said:

> "Each time a mayor is re-elected, it represents the beginning of a new four (4) year term of office. The term of service of the department directors appointed by that individual expire at the end of the appointing mayor's four (4) year term....
>
> ....[D]epartment directors are given specific authority to hold-over after the expiration of their term pursuant to Section 21-8-23(2). The effect of this language is that, ***unless they have been specifically terminated,*** at the beginning of a new four (4) year term, the prior department directors may 'hold-over' in the capacity of department director, but only until such time as the mayor makes an appointment for the current term....
>
> Section 21-8-23(2) requires that appointees be 'confirmed by an

> affirmative vote of a majority of the council present and voting at any such meeting.' When the law does not specify a time for action, a reasonable time must be implied. Therefore each new council must, within a reasonable amount of time after the beginning of a new term, be given the opportunity to confirm or reject appointees for the new term." *Op. Atty. Gen. No. 2006-0058, DuPree, Feb. 24, 2006.* (emphasis added).

A synthesis of the above AG's opinions creates a rule of reason. The mayor has the sole right to nominate persons for appointment and the council has the right of advice and consent but may withhold its consent to an appointment only for some reason which can be objectively quantified. The rules thus include the following:

1. An appointee may "hold over" but there must be some "authority" for the hold-over (See: "under the authority given him to hold over." *Miss. Code Ann. §25-1-7*; and, "unless they have been specifically terminated." *Op. Atty Gen. No. 2006-0058.*).

2. If the Council rejects a department head's reappointment, then the "hold over" is terminated. (See: *Op. Atty Gen. No. 96-0190*).

3. A Council may not circumvent the process and create a permanent hold over by either refusing to act on an appointment or voting to "table" an appointment. (See: *Op. Atty Gen. No. 96-490 Op.* and *Atty Gen. No. 2001-0647*).

The Greenwood City Council Could Not Have
Re-Hired James Littleton Without A Mayoral Nomination

The only persons which the City Council can hire in the Mayor-Council form of government is set out in *Miss. Code Ann. §21-8-13.* This statute in sub-section (1) provides that the Council may "appoint a clerk of the council and deputy clerks, as necessary." Sub-section (2) provides that the Council shall appoint an "independent accountant or accountants" to annually examine the city's "books, accounts and vouchers." The statute goes on to provide in

sub-section (4):

> "The authority of the council is otherwise legislative....No member of the council shall give orders to any employee or subordinate of a municipality....***The council shall deal with the municipal departments and personnel solely through the mayor."*** (emphasis added)

The Attorney General's Office interprets *§21-8-13* as limiting Council's hiring to that specifically enumerated in the statute, namely a clerk of the council and an accountant to examine the city's books. The AG has given an opinion that the city council has no authority to hire an attorney because it is not authorized by *§21-8-13* to hire an attorney. *Op. Atty. Gen. No. 2006-00642, Allen, Jan. 19, 2007.*

Likewise, the council cannot hire an attorney and call him a clerk or assistant clerk. As the AG noted, "[T]here is no authority for a city council to hire an attorney to provide advice to the council under the guise of appointing a deputy council clerk." *Op. Atty. Gen. No. 2006-00060, Crisler, Mar. 31, 2006.*

The mayor, in the mayor-council form of local government, has the sole power to nominate the city attorney. The Council has no authority to make the choice as to who is nominated.

Allowing the defendant Littleton to "hold over" after the Mayor had given him specific notice of termination "circumvents the process" by: (A) Depriving the mayor of her exclusive right to nominate the person who will be the City Attorney; and, (B) After being specifically terminated, defendant Littleton no longer has any ***"authority"*** to hold over.

The Council having voted down the Plaintiff's Mayoral appointment and Defendant Littleton's *"authority"* having been specifically terminated by her, the position of city attorney was then "vacant" as provided in Miss. Code Ann. *§25-1-7 (1972).* The Council cannot

circumvent the process and force Littleton on the Mayor as a "hold-over."

While it is true that the City Attorney represents both the Mayor and the City Council, the Attorney spends most of his or her time with the Mayor, who, as the Chief Executive, is responsible for the day to day operations of the City. The Attorney-Client relationship is a trust relationship just as any other fiduciary relationship. For the attorney client relationship to exist, it must be consensual on the part of both the attorney and the client.

Forcing a Mayor to work with an attorney she wants to fire certainly is not consistent with the attorney client relationship required by the Rules of Ethics. In fact, as stated in Rule 1.16(a)(3) of the Mississippi Rules of Professional Conduct, an attorney may not ethically represent a client who has discharged him.

APPELLEE HAS MET HER BURDEN
OF PROOF FOR INJUNCTIVE RELIEF

Appellee's burden of proof to obtain injunctive relief is set out by the Supreme Court in *City of Durant v. Humphreys County Mem. Hosp., 587 So.2d 244 (Miss. 1991).* The Plaintiff must show:

1. There exists a substantial likelihood that plaintiff will prevail on the merits;
2. The injunction is necessary to prevent irreparable harm;
3. The threatened injury to the plaintiff outweighs the harm an injunction might do to the defendants; and,
4. Granting a preliminary injunction is consistent with the public interest. *City of Durant, supra., 587 So.2d at 250.*

In support of her application for a restraining order and preliminary and permanent injunction, Appellee, Mayor McAdams, demonstrated the following to the trial court:

(A) There was a substantial likelihood the Plaintiff would prevail on the merits in this proceeding in that the law is clear that the mayor has the sole power to make an appointment to the city attorney's office and it is likewise clear the Council has no authority to force a mayor to work with a city attorney she does not want to work with. It is clear therefore in the circumstances of this case that the office of City Attorney for the City of Greenwood was vacant and remained vacant until the Mayor nominated Donnie Brock, III, and the Council approved his nomination.

(B) If the defendant, Littleton were to have been allowed to continue to represent to the world that he remained City Attorney for the city of Greenwood, the Mayor would have suffered irreparable harm in that her exclusive right of appointment would have been nullified and the city of Greenwood would have suffered irreparable harm by someone purporting to act for the city who had no lawful authority to so act;

(c) No harm would have befallen the City of Greenwood by preventing Appellant Littleton from acting for the City in the clear absence of any authority to so act. Therefore, the threatened and continuing irreparable injury occasioned by allowing Appellant Littleton to continue to act for the City in the absence of the authority to do so clearly outweighed the threatened harm a restraining order might have caused; and,

(D) Granting the temporary restraining order did not disserve the public interest. In fact, it served the public interest.

The "Bottom Line" Argument As To The Merits

*Miss. Code Ann. §21-8-23(3)* provides that the Mayor in the Mayor-Council form of government "may, in his discretion, remove the director of any department." The Chancellor cited this as the basis for his ruling. Specifically, he said:

> "The mayor has the exclusive power to appoint all department heads and (sic.) well as the city attorney, all of which must be confirmed by a majority of the council members....After such appointment and confirmation, each is answerable solely to the mayor and continues to serve at the mayor's will and pleasure (See Miss. Code. Ann. Sect. 21-8-23). The argument has been made that the city attorney is not a department head subject to discharge by the mayor; however, this Court is of the opinion that since the exact same procedure must be followed as to the hiring of both department heads and the city's attorney, then it is logical that the same discharge authority rests with the mayor." (Rec. at 131)

Littleton argues on appeal that the City Attorney is not a department head and the mayor therefore has no authority under *Miss. Code Ann. §21-8-23(3)* to terminate his employment as City Attorney. Mr. Littleton then jumps to the *non-sequitur* that since the Mayor has no authority to fire him under *§21-8-23(3),* then *ipso facto* he is granted the authority under §25-1-7 to hold-over regardless of what the newly-elected Mayor might want. This is clearly not the case as §25-1-7 gives an appointee the right to hold-over but only *"under the authority given him to hold over."*

Therefore, even if the Court is able to get past the fact that the case is moot and the fact that Littleton did not ask the trial court to grant the relief he now seeks, he loses on the merits. He had and has no "independent" right to hold over. He had to have some "authority" to hold over and that "authority" was destroyed when the newly elected Mayor, Carolyn McAdams, on July 6, 2009, gave him written notice that he was terminated from his position as Greenwood City Attorney.

Even assuming *arguendo* the Chancellor relied on the wrong statute when he based his decision on *§21-8-23(3)* rather than §25-1-7, any error made was harmless. Regardless of his reasoning, the Chancellor reached the correct result. To prevail on an appeal on the merits, Mr. Littleton must prove more than a technical error, he must also prove that this error "results in

prejudice and harm or adversely affects a substantial right...." *McCorkle v. Estate of McCorkle, 27 So.3d 1180, 1187 (Miss. App. 2009).* Littleton, as the Appellant, must show not only error, he must show prejudice to his rights caused by the error. *Johnston v. Johnston, 722 So.2d 453, 457 (Miss. 1998); Rounsaville v. Rounsaville, 732 So.2d 909, 911 (Miss. 1999); and, Cobb v. Cobb, 29 So.3d 145, 151 (Miss. App. 2010).*

Regardless of the basis for his ruling, the Chancellor was correct in concluding that James Littleton had no right to hold-over after the newly elected Mayor had given him written notice of termination. Therefore, any error, if any there was, was harmless. A man cannot be prejudiced in denying him a right which he did not have to begin with.

POINT IV.

THE FACT THAT APPELLEE USED THE INJUNCTIVE PROCESS RATHER THAN QUO WARRANTO OR MANDAMUS WAS, AT BEST, HARMLESS ERROR.

Appellant argues that Mayor McAdams should have used quo warranto or mandamus as the route by which to challenge Littleton's insistence of holding over even after he had been fired in writing by the newly elected mayor.

In response Mayor McAdams will state the same as stated above. To prevail on an appeal on the merits, Mr. Littleton must prove more than a technical error, he must also prove that this error "results in prejudice and harm or adversely affects a substantial right...." *McCorkle v. Estate of McCorkle, 27 So.3d 1180, 1187 (Miss. App. 2009).* Littleton, as the Appellant, must show not only error, he must show prejudice to his rights caused by the error. *Johnston v. Johnston, 722 So.2d 453, 457 (Miss. 1998); Rounsaville v. Rounsaville, 732 So.2d 909, 911 (Miss. 1999); and, Cobb v. Cobb, 29 So.3d 145, 151 (Miss. App. 2010).*

Regardless of the vehicle used by McAdams to challenge Littleton's insistence on holding

over, the Chancellor was correct in concluding that James Littleton had no right to hold-over after the newly elected Mayor had given him written notice of termination. Therefore, any error, if any there was, was harmless. Regardless of the manner or method of challenge, a man cannot be prejudiced in denying him a right which he did not have to begin with.

## POINT V.

## ANSWERING APPELLANT'S IRRELEVANT ARGUMENTS

### IRRELEVANT POINT ONE

### THIS LAWSUIT WAS NOT RACIALLY MOTIVATED AS MR. PERKINS SEEMS TO INFER[10]

If Greenwood ever has any hope of moving forward, it is going to have to learn how to honor those who selflessly and courageously secured the right of African-Americans to vote while at the same time leaving the past in the past and living in the present.

The atmosphere in Greenwood in the early 60's was graphically captured by Frank Parker in his book Black Votes Count:[11]

> From the summer of 1962 to the spring of 1963, Leflore County, a predominantly black county in the Mississippi Delta in northwest Mississippi, was the testing ground for democracy for the civil rights movement....As a result of SNCC's organizing efforts, hundreds of black people attempted to register. Not only did the county registrar refuse to register black applicants, but this voter registration campaign was met with a reign of terror from the white community. The SNCC office attacked by a group of armed whites, forcing the SNCC workers to flee through a second story window; the county board of supervisors cut off the federal surplus food program upon which most black families were dependent; SNCC workers were arrested on trumped-up charges; and black

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[10] Nor was it politically motivated as Mr. Perkins alleges.

[11] FRANK R. PARKER, BLACK VOTES COUNT – POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965, UNIV. OF NORTH CAROLINA PRESS (1990).

> homes were shot into and black businesses and the SNCC office were burned.
>
> In February 1963, on the highway outside Greenwood, the county seat, three whites in a car pulled alongside of and fired a burst of gunfire into a car containing Robert Moses, SNCC leader and COFO voter registration director; Randolph Blackwell....Travis, the driver, was seriously wounded in the neck and shoulder.
>
> These incidents of violence and intimidation spurred numerous protests and marches on city hall and the county courthouse by the outraged black community. In March, shots were fired into the home of Dewey Greene, a voter registration worker..., and more than one hundred black people marched on city hall in protest. Even before the more highly publicized incidents in Birmingham, Alabama, the demonstrators in Greenwood were met by a line of armed police officers, and a police dog attacked the marchers. PARKER, *supra.*, Note 11, at 15-16.

There is no doubt that the entire community, both black and white, should honor those African-Americans and others who bravely withstood years of discrimination, intimidation and violence. The fruit of their efforts has been to secure to the African-American community the right to vote and to exercise all other Civil Rights guaranteed all Americans.

Nevertheless, even though we should honor these persons, if Greenwood is going to move forward, all its citizens are going to have to learn to remember but at the same time let the past go. The motive of every person cannot be viewed through the prism of the early 1960's. If a person of another race opposes your position on some issue, this does not, in itself, mean that person is a racist or racially motivated.

Sadly, Willie Perkins, counsel for the defendants, viewing this dispute through the lens of the 60's has accused the Mayor and her attorneys of being racists for filing this lawsuit. As set out more fully below, the five councilmen sued are African-American. They were not sued however on account of their race. They were sued because they supported an independent right

in James Littleton to hold over notwithstanding the fact that the Mayor had terminated him.

What Appellant Littleton and his counsel fail to recognize and acknowledge in this case is that the five black councilmen and the former black city attorney are no longer members of a minority group in Leflore County. Since the 1970 census, the white population of Greenwood and Leflore County has decreased by 45% until whites now make up only 27.9% of Leflore County's population. Blacks now make up 72% of the county's total population with a few minorities sprinkled in the mix.[12] Five of the Seven City Council Members are black. Until Mayor McAdams election, the Mayor was black; four of the five county supervisors are black; the Superintendent of the City's School District is black; the Superintendent of the County's School District is black; two of the four Circuit Judges are black; the County Board of Supervisors' Attorney is Black; the last County Court Judge was black; and, the County's Tax Collector is black. Greenwood has one black senator in the State Senate, one black representative in the State House, and it is represented in the U.S. House of Representatives by a black representative.

In fact, Mississippi "has the largest number of black officials in the country." Robbie Brown, *First Black Mayor in City Known For Klan Killings,* N.Y. Times, May 21, 2009.[13]

As *unmistakably* demonstrated by the U.S. Supreme Court this past term, it is no longer politically correct to "play the race card" and claim racial bias every time a white person opposes something which a black person wishes to do.

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[12] Charlie Smith, News Editor, *Leflore White Population Has Fallen 45% Since '70,* The Greenwood Commonwealth, April 25, 2010, at 1-A. [Just as Appellant's counsel has supplemented the records with facts "as an officer of the court," (see footnote 3 of Appellant's Brief at p. 19), Appellee's counsel will do likewise.

[13] Published on-line at http://www.nytimes.com/2009/05/22/us/22mayor. http://html?_r=1

For example, no longer may a city assume from the fact that a higher number of black persons are excluded from promotion by some employment policy or exam this *ipso facto* means the employment practice or exam is racially biased. Ricci v. DeStafano, ___ U.S. ___, *129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009).*

Formerly, an employer's good-faith belief that its actions were necessary to comply with Title VII's disparate impact provision was enough to justify race conscious conduct. Ricci v. DeStafano, *supra., 129 S. Ct. at 2674-75.* However, in a major paradigm shift, the Supreme Court last term adopted in its place a new standard which it calls the "strong-basis-in-evidence" standard. The new standard is that –

> "If an employer cannot rescore a test based on the candidates' race, §2000e(l), then it follows *a fortiori* that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates-absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision." Ricci v. DeStafano, *supra., 129 S. Ct. at 2676.*

Likewise, the Supreme Court now questions whether the pre-clearance requirements of Section 5 of the 1965 Voting Rights Act are outdated and thus unconstitutional. Northwest Austin Mun. Utility Dist No. One v. Holder, ___ U.S. ___, *129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009).*

Prior to its decision in Northwest Austin the law was that a political entity in full compliance with the Voting Rights Act could under §4(a) of the Act file a "bail out" suit to be removed from the coverage of the Act. Case law however limited the "bail out" to a state.

In Northwest Austin the Court expanded the "bail out" right to also cover cities, counties and/or any other political sub-division of a state. That is to say, a city in compliance could "bail

out" of the Act's coverage even though its state remained covered by the Act.

The important point to take from Northwest Austin though is that the Court now questions the continued validity of the Voting Rights Act, itself:

> "Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law - however innocuous - until they have been pre cleared by federal authorities in Washington....
>
> Some of the conditions that we have relied upon in upholding this statutory scheme...have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.
>
> These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success. *Past success alone, however, is not adequate justification to retain the pre-clearance requirements....*It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But *the Act imposes current burdens and must be justified by current needs.*
>
> ....
>
> The evil that §5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." Northwest Austin, *supra., 129 S. Ct. at 2511-12.* (emphasis added)

Likewise, the two councilmen who were not sued are white. They were *not* omitted however as defendants on account of their race. They were not sued because they did not support an independent right in James Littleton to hold over notwithstanding the fact that the Mayor had terminated him. They have always maintained the position that the Mayor acted lawfully and within her rights as Mayor when she fired Littleton and Littleton had no right to hold over after

being fired.

The *Real* Facts In This Case

Notwithstanding the mayor's express termination of Mr. Littleton, at the next Council meeting held on or about July 7, 2009, Mr. Littleton attended and purported to continue to act as the Greenwood City Attorney. He further announced his intention to those assembled and the world at large that, regardless of what the Mayor might prefer, he was going to continue to serve as the Greenwood City attorney unless and until his successor had been appointed by the Mayor and approved by the Council. In fact he went so far as to announce the Council could not function without his assistance and presence at their meetings.

At this same Council meeting the five defendant Council Members voted to reject the Mayor's nomination of the law firm of Abraham & Rideout to serve during the upcoming year as the city attorney for the city of Greenwood and further announced they were satisfied with Defendant Littleton and, at a minimum, implied by their silence that as a holdover he could continue to serve until his successor had been appointed by the Mayor and approved by the Council. (Rec. 4-5)

The Factual Pleadings In The Present Case

Paragraph 8 of the complaint alleges:

> "Notwithstanding the mayor's express termination of Mr. Littleton, at the next council meeting held on or about July 7, 2009, Mr. Littleton attended and purported to continue to act as the Greenwood City Attorney. He further announced his intention to those assembled and the world at large that, regardless of what the Mayor might prefer, he was going to continue to serve as the Greenwood City attorney unless and until his successor had been appointed by the Mayor and approved by the Council. In fact he went so far as to announce the Council could not function without his assistance and presence at their meetings." (Rec. 4)

The Council members answered paragraph 8 saying:

> "These defendants admit the allegation contained in paragraph numbered 8 of the complaint that ***City Attorney James Littleton*** attended the July 7, 2009, meeting of the Greenwood City Council and ***served as City Attorney*** and made certain comments and ***advised the council***. The remaining allegation contained in paragraph numbered 8 of the complaint are denied."[14]

Here's what the City Council members admitted and stated in their answer to paragraph number 8 of the complaint:

1. When James Littleton attended the July 7, 2009, Greenwood City Council meeting, he was serving in the office of the Greenwood City Attorney; and,

2. While at the July 7, 2009, Greenwood City Council meeting, James Littleton functioned as the lawful Greenwood City Attorney and "advised the council."

The following allegations were also made in paragraph 16 of the complaint and denied by the Council members in their answer:

3. James Littleton was purporting to act as the Greenwood City Attorney when he had no lawful authority to do so;[15]

4. The Council has no authority to force a mayor, in the mayor-council form of government, to work with a City Attorney, whom she has not nominated and does not desire to work with;[16]

5. That after the Council on July 7, 2009, had turned down the mayor's appointment

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[14] See ¶8, third page, of the answer dated August 3, 2009, (emphasis added) (Rec. 86).

[15] See ¶16(B) and ¶16(C) of the July 19, 2009, complaint (Rec. 7-8), and ¶16, page four, of the August 3, 2009 answer (Rec. 87).

[16] See ¶16(A) of the July 19, 2009, complaint (Rec. 7), and ¶16, page four, of the August 3, 2009 answer (Rec. 87).

of Abraham & Rideout, the office of city attorney was vacant and would remain vacant until the mayor had nominated someone who was then confirmed by the Council.[17]

In their response to Plaintiff's Motion For Preliminary Injunction the Councilmen were even more explicit in saying Littleton had a right to holdover regardless of what the Mayor wanted:

> "There is hardly any likelihood plaintiff will prevail on the merits. Plaintiff cites no case authority to show she can terminate a hold-over City Attorney. Section 25-1-7 grants Defendant Littleton authority to hold over until his successor is appointed or qualified. Littleton, as City Attorney, is appointed on an annual basis pursuant to Section 21-15-25. The City Attorney position is not a department head. ***Defendant Littleton has a right to hold over***. City Council Defendants do not play any role whatsoever in the hold-over City Attorney position. **This action is statutory and is automatic by law...."*(emphasis added).***[18]

It is clear therefore when you examine the allegations in the complaint and the Council Member's answer and response to Plaintiff's Motion For Injunctive Relief against James Littleton, the position of the Council Members made defendants in this lawsuit was that regardless of the Mayor's letter of termination to James Littleton, Mr. Littleton would remain the City Attorney, as a hold-over appointee, unless and until the Mayor nominated a replacement and this replacement was confirmed by majority vote of the city Council.

IRRELEVANT POINT TWO

Willie Perkins Entire Argument Is Grounded On The Proposition

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[17] See ¶16(A) of the July 19, 2009, complaint (Rec. 7), and ¶16, page four, of the August 3, 2009 answer (Rec. 87).

[18] *Council Defendants Response In Opposition To Application For Temporary Restraining Order And Motion For Preliminary Injunction, August 3, 2009, at page 6 (Rec. 95).*

> That The Intent In Filing This Lawsuit Was Forcing The Defendants To Compromise With The Mayor On A Choice For City Attorney. Mr. Perkins Has Twisted And Contorted The Argument of Counsel To Suit His Own Needs Rather Than Giving It A Fair Reading. The Mayor's Counsel Argued That Under The Republican Form Of Government On Which Greenwood's Government Is Based, Power Is Diffused Between The Three Branches of Government In Order To Compel The Legislative To Compromise Rather Than Dictate To The Executive; and, That If This Court Were To Support An Independent Right In James Littleton To Hold Over, It Would Upset This Delicate Balance Of Power

Willie Perkins Entire Argument is grounded on the proposition that the intent in filing this lawsuit was forcing the defendants to compromise with the mayor on a choice for City Attorney. This is a gross distortion of Counsel's argument. The most charitable reading of this gross distortion is that Mr. Perkins lacks a basic understanding of the Founding Fathers and their intent in choosing a Republican form of government with a diffusion of powers which they hoped would allow America to escape forever the tyranny which they had suffered at the hands of the Crown.

In argument counsel for the Mayor in discussing Greenwood's form of government and that on which it is based, said the following:

> Just a couple quick reply points. The first question: What if there is no city attorney for the next ninety days? And I argue that's exactly what this statutory system is set up for.
>
> If you buy into the argument, which I think is correct, that there is supposed to be a ***diffusion of power between the executive and legislative branches of the city government, the whole purpose of that diffusion of authority is to prevent any branch of government from becoming a dictator to another branch of government.***
>
> If this Court does what I think it should do, and says there is no city attorney, what that is going to [do is] force these ***two branches of government*** to...compromise towards the middle. If you leave

> somebody in office that ***one branch of government*** clearly wants and the other one doesn't, there is simply no motivation to try to compromise.
>
> ***THAT'S THE BEAUTY OF THIS FORM OF GOVERNMENT....IT IS A DIFFUSION OF POWER TO FORCE THE BRANCHES OF GOVERNMENT TO COOPERATE WITH EACH OTHER AND COME TOWARDS THE MIDDLE*** and find somebody that is agreeable to both.[19]

First, it is clear that the Strong Mayor-Council form of government which Greenwood has is modeled on the Federal Constitution with its separation and diffusion of powers. For instance the Supreme Court in *Jordan v. Smith, 669 So.2d 752 (1996),* in upholding the "advice and consent" function of the legislative branch in Greenwood's government, said:

> Moreover, the approval or 'advice and consent' requirement in the appointment process for executive and judicial officers has never been questioned as outside the legislative domain. Executive and other non-legislative officials are made subject to legislative advice and consent at all levels of government in our country. *See, e.g.,* United States Constitution art. II, §§I and II, cl. 2. United States Constitution (providing respectively, that the executive power is vested in the President and that the appointment power with respect to officers and judges shall be exercised with the advice and consent of the Senate.).... *Jordan v. Smith, supra., 669 So.2d at 757.*

Hattiesburg has the same form of government as Greenwood. In commenting on the diffusion of power feature of the Strong Mayor-Council form of government, the Supreme Court in DuPree v. Carroll, *967 So.2d 27 (Miss. 2007),* said:

> The statutory scheme authorizing the mayor-council system expressly gifts that legislative body with strong checks and balances on the executive power of the mayor. While only the mayor may nominate department directors, it is only through the assent of the council that they may become directors. DuPree v.

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[19] Transcript of Oral Argument before Judge Joe Webster on August 17, 2009, at pages 36-37. (emphasis added) (Vol. 2 of 2 of Record on Appeal)

*Carroll, supra., 967 So.2d at 29.*

The reasoning supporting the concept of the diffusion of power which causes the executive and legislative branches to compromise rather than one trying to dominate the other, reasoning of which Attorney Perkins is apparently unaware, was well set out by Akhil Reed Amar in his book AMERICA'S CONSTITUTION:

> Federalists in the late 1780s surveyed the scene with dismay. Skewed state constitutions, they believed, were enabling state legislatures to run amok. Writing as Publius, Madison quoted his old friend Jefferson on the Virginia experience: "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating [of] these in the same hands is precisely the definition of despotic government."....Hamilton/Publius sharpened the point, condemning state legislatures' efforts to "exert an imperious control over the other departments" and acidly noting that "the representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves."
>
> The constitutional solution – first promoted at the state level in places such as Massachusetts and then copied by the architects of the new central government – was to give the executive and judicial branches more powers and increased independence from the legislature, which had to be split in two. In Virginia, Jefferson had urged that "the powers of government should be so divided and balanced among several bodies of magistracy, that no one could transcend their legal limits, without being effectually checked and restrained by the others." Amar, AMERICA'S CONSTITUTION, *supra.,* at 59-60.

What the above proves beyond any doubt is that the Mayor's counsel did not say this lawsuit was filed to force a compromise between the Mayor and Council. What the Mayor's counsel said was that Greenwood's *form of government* is based on the Federal Constitution and the form of government, itself, is so constructed that neither the legislative (City Council) nor the executive (the mayor) can dominate and dictate to the other.

Counsel for the Mayor argued: "My third point is....I say that the form of government in

Greenwood is closely modeled after the national form of government and the purpose of the national form of government, is a set checks and balances...."[20]

This diffusion of power in our city government, just as in the National government, compels the parties to compromise to break the deadlock. The point which the Mayor's counsel was making was that if this court were to find in James Littleton, the former City Attorney's, favor, finding the right personal to him to holdover, regardless of what the Mayor might want, it would be upsetting the balance of power built into the structure of the Mayor-Council form of government. In effect, the Court would be putting its thumb on the scale in favor of the City Council, thereby negating the principle of diffusion of power and thus what Madison said was "precisely the definition of despotic government."

IRRELEVANT POINT THREE

> The Council Members From Wards 3, 4, 5, 6, and 7 were sued because they claimed that James Littleton, regardless of the fact that the Mayor had sued him, had a right personal to him to holdover. The Council Members from Wards 1 and 2 were not sued because they agreed with the Mayor that after the Mayor had fired James Littleton, he had no right, personal to him or otherwise, to hold over

The five councilmen sued are African-American. They were not sued however on account of their race or the fact that they are Democrats. They were sued because they supported an independent right in James Littleton to hold over notwithstanding the fact that the Mayor had terminated him.

Likewise, the two councilmen who were not sued are white. They were not omitted however as defendants on account of their race or the fact that they are Republicans. They were

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[20] Transcript of Oral Argument before Judge Joe Webster on August 17, 2009, at pages 16-17.

not sued because they did not support an independent right in James Littleton to hold over notwithstanding the fact that the Mayor had terminated him. They have always maintained the position that the Mayor acted lawfully and within her rights as Mayor when she fired Littleton and Littleton had no right to hold over after being fired.

## Conclusion

The appeal of James Littleton is moot. His successor has been lawfully appointed by the Mayor and confirmed by the Greenwood City Council. There is therefore no practical relief which can be granted to Mr. Littleton.

The only relief sought by Mr. Littleton from this Court is relief which was not requested by him from the trial court. That is to say, he now seeks damages for an allegedly improper granted injunction under Rule 65(c) of the Miss. R. Civ. P. It is Hornbook law that an Appellate court cannot and will not grant relief which was not requested in the trial court.

Even were Mr. Littleton somehow able to overcome these two insurmountable obstacles, he would lose on the merits. His argument that Miss. Code Ann. §25-1-7 gave him as Greenwood's City Attorney some right *independent* of the Mayor's right to choose her own city attorney to hold over, is simply contrary to all the law and foreign to the Republican form of government on which the Mayor Council form of government in the City of Greenwood is based.

While a Mayor's nomination in the Mayor Council form of government is subject to confirmation in Greenwood because of a Greenwood ordinance to that effect, the Mayor is the Chief Executive Officer and she therefore has the sole authority to appoint and/or dismiss the City Attorney. To give the City Attorney an independent right to hold-over greater than that of the Mayor to discharge him would simply stand the government on its head.

The remainder of the arguments made by Appellant Littleton are not only irrelevant but

erroneous. Race played no part in the Mayor's decision and neither was the suit filed for the purpose of coercing the Council into agreeing with the Mayor.

For all these reasons, the appeal of James Littleton, III should be denied as being without merit with all costs of the appeal taxed against Appellant.

Because the issues of mootness and the inability of this Court to grant relief which was not requested in the trial court are so clearly defined, Appellee pleads that this appeal is frivolous and Appellee should be awarded just damages and double costs under M.R.A.P. 38.

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**CERTIFICATE OF SERVICE**

I, Preston Rideout, do hereby certify that I have this day caused to be mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Appellee's Brief to:

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DATED, this the 15th day of October, 2010.

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