

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM UNION COUNTY
Court of Common Pleas

S.C. SUPREME COURT

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000853

Dwayne Thompson, Respondent,

v.

LG Chem, Ltd., LG Chem America, Inc.,
and Rolling Fog Vapor Company, LLC,Defendants,

Of whom, LG Chem, Ltd. and LG Chem America, Inc. are the..... Petitioners.

RESPONDENT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Respondent Dwayne Thompson respectfully submits this Reply in further support of his Motion to Dismiss. Respondent seeks to address numerous contentions raised by Petitioners in response to Respondent's Motion. First, Petitioners seem to make light of the fact that Respondent, in thorough detail, set forth historical precedents and authority, including previous versions of S.C. Code section 14-3-330(2), to demonstrate that South Carolina law traditionally holds that an order denying a motion to dismiss for lack of personal jurisdiction is not immediately appealable and is outside of the Court's appellate jurisdiction. Respondent did not pluck a solitary case from decades ago in a desperate attempt to

support his position; to the contrary, Respondent's position, unlike Petitioners', is supported by an enormous weight of authority reaching into this State's nineteenth century jurisprudence. The fact that *Agnew* decision is over one hundred years old does not make it a legal relic, and if anything, it demonstrates that it has been a foregone conclusion under South Carolina law, nearly reaching back to the Reconstruction Era, that orders denying such motions do not discontinue an action or prevent a judgment from which an appeal may be taken.¹ If there are no more recent, relevant decisions explicitly addressing this issue, it is because the appellate courts in this state have consistently recognized for some time that under our appellate jurisdiction statute there is no jurisdiction for the interlocutory review of such orders.

Second, Petitioners assert that Respondent has waived his right to argue that the subject Order does not implicate a substantial right as set forth in section 14-3-330(2). This is not supported by the text of Respondent's Motion. Respondent has advanced the argument that the substantial due process rights referred to by Petitioners have been misrepresented or misunderstood, and that any such rights would not be affected until a final judgment of the Circuit Court is rendered in this matter. Thus, while Petitioners may have a due process right in a court's exercise of personal jurisdiction, the subject Order does not affect such a right. This is one of the primary arguments supporting Respondent's motion. In opposition, Petitioners

¹ *Agnew* was an insufficient process case finding that an order denying the defendant's motion to dismiss for lack of personal jurisdiction did not discontinue the action or prevent an appeal from a final judgment. *Agnew v. Adams*, 24 S.C. 86 (1885) (*rev'd on other grounds Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 426 S.E.2d 777 (1993)).

argue that under Arizona and Nevada precedents, an order denying a motion to dismiss for lack of personal jurisdiction affects a substantial right by preventing an adequate appeal, and that this logic should be embraced by the Court. Petitioners' logic is that such an order prevents an adequate appeal because by the time final judgment is reached, the defendant has been improperly required by the court to defend itself in a forum that does not have personal jurisdiction over him.

However, none of the cited decisions address a state appellate jurisdiction statute that is similar or analogous to South Carolina's; rather, the three cited decisions set forth that when an appeal from a final judgment would be ineffectual, other avenues of review under certain extraordinary writs are available to the litigant. The Arizona decision was based upon the state court's "special action" jurisdiction, which appears to be analogous to South Carolina's extraordinary writ jurisdiction. *See Scott v. Kemp*, 460 P.3d 1264 (Ariz. Ct. App. 2020). The two Nevada decisions were predicated upon writs of prohibition. *See Fulbright & Jaworski v. Eighth Jud. Dist. Ct.*, 342 P.3d 997 (Nev. 2015); *Viega GmbH v. Eighth Jud. Dist. Ct.*, 328 P.3d 1152 (Nev. 2014). South Carolina law is in keeping with these decisions in that it already permits litigants to seek review of orders from which an appeal would not be adequate under similar extraordinary writs. *Rowe v. City of W. Columbia*, 334 S.C. 400, 406, 513 S.E.2d 379 (Ct. App. 1999). None of these decisions hold that immediate appellate review of orders affecting personal jurisdiction affect a substantial right, and the cited decisions are inapposite to the arguments before the Court.

Regardless, Petitioners mislead the Court by arguing that an appeal of a final judgment in this case would be ineffectual and inadequate to protect any substantial due process rights that may be implicated by the subject Order. The Supreme Court of the United States has determined that the substantial right to be free from a forum's personal jurisdiction entails the right to be free from that forum's coercive power to bind the litigant to an adverse final judgment. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879-80, 131 S. Ct. 2780, 2786-87 (2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923, 131 S. Ct. 2846, 2853 (2011); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 2181 (1985). Therefore, a litigant's due process rights are not adversely affected by an interlocutory order denying a motion to dismiss, as the litigant has yet to be bound by any final judgment by the court, and he may effectively have the action dismissed on summary judgment or may prevail at trial.

This has been specifically addressed by the Supreme Court, which has stated that the general rule is that an order is "effectively unreviewable" only "where the order at issue involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial", and that while any interest in freedom from litigation in a foreign court lacking personal jurisdiction may not be perfectly secured by appeal after final judgment, it is "adequately" and "effectively vindicable" at that stage. *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498-501, 109 S. Ct. 1976, 1978-80 (1989). In other words, under the reasoning of our highest court, having to defend this action in a South Carolina court does not affect

a substantial right of Petitioners by preventing a final judgment from which an appeal could be effectively taken, and Petitioners cannot satisfy the requirements of section 14-3-330(2).

Third, Petitioners correctly note that in addition to North Carolina and Minnesota three additional states, previously unknown to the undersigned, permit as a matter of right the immediate appeal of interlocutory orders affecting a substantial right. However, three of the states, Texas, Florida, and New York, have either (1) appellate jurisdiction statutes or rules identical to that of North Carolina, which permits the immediate appeal of an interlocutory order affecting a substantial right without any regard to whether it discontinues an action or prevents a final judgment from which an appeal may be taken, or (2) rules or statutes that specifically permit the appeal of orders denying motions to dismiss for lack of personal jurisdiction. Tex. Civ. Prac. & Rem. Code § 51.014(a)(7); Fla. R. App. P. 9.130(a)(3)(C)(i); N.Y. C.P.L.R. 5701(a)(2)(v). Minnesota appellate courts have an even broader grant of jurisdiction and are essentially allowed to find that any order is appealable. Minn. R. Civ. App. P. 103.03(j).

Section 14-3-330(2) includes language rendering South Carolina's appellate jurisdiction much narrower than the appellate jurisdiction of these states by requiring an interlocutory order to affect a substantial right **and** to discontinue an action or prevent a final judgment from which an appeal may be taken before such an order can be immediately appealed. And there is no rule of appellate procedure in this State granting sweeping appellate power to review interlocutory orders such

as the one at issue in this case. South Carolina's law appears to be unique and easily distinguishable from the aforementioned states in that it heavily curtails the Court's appellate jurisdiction over interlocutory orders in a manner not practiced by many other states, but that is the law as written by our General Assembly.

Fourth, Petitioners argue that "numerous other state court jurisdictions have allowed interlocutory appeals of denials of motions to dismiss for lack of personal jurisdiction, recognizing the importance of the constitutional rights at stake and the inadequacy of appeal after forcing a foreign defendant to defend itself through a trial in a jurisdiction that has no authority over it." What Petitioners leave out is that few to none of these states have statutory guidelines and rules defining the states' appellate jurisdiction as narrowly as section 14-3-330(2) does. Relying on the cited decisions, a jurisdiction's ability to review an interlocutory order denying a motion to dismiss for lack of personal jurisdiction may be primarily categorized as follows: (1) states having statutes or rules explicitly allowing for such a motion to be immediately appealed as a right, (2) states having statutes or rules allowing a certification or application process for such an appeal, (3) states having statutes or rules providing for the discretionary appeal of interlocutory orders in general, and (4) states having extraordinary writ mechanisms, presumably in an appellate court's original jurisdiction, through which litigants may petition an appellate court for relief. The cited decisions are unconvincing as far as Petitioners' arguments are concerned because they are essentially irrelevant to a statutory interpretation of section 14-3-330(2) and implicate statutes with significantly different language.

South Carolina does not have any statutes or rules providing for certification or discretionary review of interlocutory orders, and it does not have a statute or rule specifically providing for the immediate appeal of orders affecting personal jurisdiction. South Carolina does have avenues such as an extraordinary writ of certiorari or a writ of mandamus in the Court's original jurisdiction for the review of orders from which an appeal may not provide effectual relief, and Petitioners have already petitioned the Court for such a writ, to no avail. The decisions cited by Petitioners are not persuasive, primarily because most if not all of them do not implicate an appellate jurisdiction statute that is as restrictive as South Carolina's, and instead rely on statutes and rules that have not been enacted or promulgated in South Carolina.

In sum, it has been the law of this State for almost 140 years that an order denying a motion to dismiss for lack of personal jurisdiction is not immediately appealable because such an order does not satisfy both prongs of the test under section 14-3-330(2).² The Supreme Court of the United States has indirectly confirmed this Court's logic in *Agnew* by finding that a litigant's due process interest in a court's exercise of personal jurisdiction would only involve the right to be free from binding judgments, and this right can be effectively and adequately vindicated by a post-trial appeal. Since the subject Order does not effectively prevent a final judgment from which an appeal could be taken or discontinue

² Such an order does not involve the merits either as required by section 14-3-330(1). *Mid-State Distribs.*, 310 S.C. at 336, 426 S.E.2d at 781.

Respondent's action, this Court does not have appellate jurisdiction to entertain Petitioners' Appeal under section 14-3-330(2).

There is no mechanism for a certification or application process for appellate review of interlocutory orders within this State, and such a mechanism would need to be described by statutes or rules that we don't have. Petitioners cannot complain that South Carolina does not provide the means for similarly positioned parties to ask this Court for relief; discretionary review of the subject Order was available to Petitioners through an extraordinary writ in the Court's original jurisdiction, but their request was summarily denied by this Court, and for good reason. For these reasons and those set forth in Respondent's Motion to Dismiss, Respondent respectfully requests that the Court dismiss the Writ of Certiorari as improvidently granted, as the Court does not have appellate jurisdiction over this matter, through statutory interpretation principles or *stare decisis*.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

By:  _____

June 14, 2023
Hampton, South Carolina

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