

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM UNION COUNTY
Court of Common Pleas
William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000853

RECEIVED

Sep 18 2023

S.C. SUPREME COURT

Dwayne Thompson, Respondent,

v.

Rolling Fog Vapor Company, LLC,

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

**PETITIONERS LG CHEM, LTD. AND LG CHEM AMERICA, INC.'S
RETURN AND OPPOSITION TO RESPONDENT'S MOTION TO STRIKE
PORTIONS OF PETITIONERS' BRIEF AND MOTION TO STAY TIME LIMIT
FOR FILING RESPONDENT'S BRIEF**

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INTRODUCTION

On June 20, 2022, Petitioners LG Chem and LGCAI filed a Petition for Writ of Certiorari raising two issues: (1) did the Court of Appeal err in finding that the underlying orders denying Petitioners' motions for lack of personal jurisdiction based on an absence of constitutional minimum contacts were not immediately appealable and (2) in dismissing the appeal, did the Court of Appeals err by failing to reverse the trial court's failure to dismiss the case for lack of personal jurisdiction against both Petitioners in violation of constitutional due process? The Court granted the petition, and Petitioners timely filed a merits brief addressing both issues raised in the petition.

This is not the first time Respondent has raised a technical argument in an attempt to persuade the Court not to consider an issue on which it previously granted review. Respondent previously moved to dismiss the appeal for lack of subject matter jurisdiction, attacking the first issue in this appeal. The Court denied that motion without prejudice to Respondent's ability to raise the same argument in his Respondent's brief.

Now, Respondent attacks the second issue in this appeal, seeking an order striking the portions of Petitioners' brief addressing the second issue raised in the petition even though this Court previously granted review of that issue.

Petitioners' Brief to this Court addresses the identical two issues that were the subject of the petition they filed and that this Court granted. As these two issues were expressly included in the petition for review, both were properly included in Petitioners' brief, and Respondent's motion should be denied.

BACKGROUND

On May 21, 2021, Petitioners LG Chem and LGCAI filed a Notice of Appeal of the lower court's orders denying (1) LG Chem's Renewed Motion to Dismiss and Quash Service of Process;

(2) LG Chem’s Motion to Reconsider March 19, 2021 Order Denying its Renewed Motion to Dismiss and Quash Service of Process; (3) LGCAI’s Renewed Motion to Dismiss; and (4) LGCAI’s Motion to Reconsider March 19, 2021 Order Denying its Renewed Motion to Dismiss. (Appx. 1237-61.)

By letter dated July 9, 2021, the Court of Appeals notified Petitioners that “[a] preliminary review of the order challenged on appeal indicates that it might not be appealable” and asked Petitioners to file and serve a memorandum addressing the issue of appealability within ten days of the letter. (Appx. 1262-64.) Petitioners filed their requested appealability memorandum on July 19, 2021. (Appx 1145-1236.) Respondent did not file a response.

On March 10, 2022, the Court of Appeals dismissed the appeal on the basis that “the underlying order is not immediately appealable.” (Appx. 32.) On March 25, 2022, LG Chem and LGCAI filed a Petition for Rehearing asking the Court to reconsider its decision on appealability and to review the orders. (Appx. 1265-81.) Respondent did not file a response. The Court of Appeals denied the Petition For Rehearing on May 19, 2022. (Appx. 34-35.)

Petitioners filed their Petition for a Writ of Certiorari before this Court on June 20, 2022, raising the two issues identified above. Respondent filed a return, addressing only the first issue. Petitioners filed a Reply on August 8, 2022, addressing the arguments in Respondent’s return and pointing out that Respondent did not address the substance of Petitioners’ arguments as to why the circuit court’s orders should be reversed (the issue Respondent now seeks to strike).

On March 7, 2023, this Court granted the petition for review. After Petitioners filed their merits brief, Respondent filed a motion for an extension of time to file Respondent’s Brief. After that motion was granted, however, instead of filing his brief on May 22, 2023 when it was due, Respondent instead filed a motion to dismiss the appeal for lack of subject matter jurisdiction.

Petitioners opposed the motion, and by Order dated August 10, 2023, the Court denied the motion without prejudice to Respondent's right to raise those arguments in his brief.

On August 17, 2023, Respondent filed a motion for leave to exceed the page limits. On August 21, 2023, Respondent served his brief, accompanied by a motion to supplement the appendix. By Order dated August 23, 2023, the Court denied Respondent's motion to exceed the page limits and directed Respondent to file an amended brief that complies with the page limits set forth in Rule 242(d)(4), SCACR. Instead of filing his amended brief, Respondent filed his Motion to Strike and for a Stay.

LAW AND ANALYSIS

I. Petitioners' merits issues are properly included in Petitioners' Brief to this Court.

Respondent argues that LG Chem and LGCAI have not "meaningfully" raised the personal jurisdiction issues that are at the heart of this appeal. To the contrary, LG Chem and LGCAI have raised the lack of personal jurisdiction at every stage of these proceedings, including filing motions for reconsideration in the circuit court, which Respondent does not address.

The petition for rehearing filed on March 25, 2022 was directed at the Court of Appeals' order dismissing LG Chem's and LGCAI's Notice of Appeal after the Court of Appeals had concluded that "the underlying order is not immediately appealable." (Appx. 32-33.) There is no requirement to include a statement of issues on appeal in a Notice of Appeal, and the sole issue pending before the Court of Appeals at that time was whether or not it would hear the merits of LG Chem's and LGCAI's appeal. It declined to do so. Therefore, although LG Chem and LGCAI raised the personal jurisdiction issue before the Court of Appeals, they did not have the opportunity to submit full briefing on the merits of that issue to the Court of Appeals.

When LG Chem and LGCAI approached this Court for relief, they properly included both issues in their Petition, and this Court granted the Petition, thereby certifying for review the issues that were raised in the Petition. Those are the same issues covered in Petitioners' Final Brief.

II. The Supreme Court has the power to issue a writ of certiorari and rule on both questions presented.

Recently, this Court confirmed that Article V, section 5 of the South Carolina Constitution and South Carolina Code § 14-3-310 of the South Carolina Code provide that "[t]he Supreme Court shall have power to issue writs or orders of . . . certiorari . . ." and that "[p]ursuant to this authority, this Court may use a common-law writ of certiorari to correct errors of law, particularly where a trial court exceeded its authority." *State v. Price*, No. 2023-000629, 2023 WL 5734348, at *3 (S.C. Sept. 6, 2023) (citing *City of Columbia v. S.C. Pub. Serv. Comm'n*, 242 S.C. 528, 532, 131 S.E.2d 705, 707 (1963) ("A writ of certiorari is used to keep an inferior tribunal within the scope of its powers." (citing *Ex parte Schmidt*, 24 S.C. 363, 364 (1886); *State ex rel. Martin v. Moore*, 54 S.C. 556, 560, 32 S.E. 700, 701 (1899)) and *State v. Ansel*, 76 S.C. 395, 412, 57 S.E. 185, 191 (1907) ("The writ of *certiorari* is issued by a superior Court to an inferior judicial or quasi-judicial tribunal or officer to certify the record of trial to the superior Court for its review to ascertain whether the inferior tribunal . . . exceeded its powers, or committed substantial errors of law, but not to review the facts." (citing *Ex parte Riggs*, 52 S.C. 298, 302, 29 S.E. 645, 646 (1898))).

Here, even if Respondent had a rule to support his argument that LG Chem and LGCAI should have fully briefed the merits of their appeal when responding to the Court of Appeals' request for a memo on appealability (which he does not), Respondent's motion should still be denied in any event because this Court had previously granted review of both the issues that were addressed in Petitioners' Final Brief. This renders Respondent's unsupported technical challenge moot.

III. The Court should deny Respondent’s Motion to Strike and Motion to Stay as untimely.

Respondent argues that, under Rule 242(d), “[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented.” (Resp’t’s Br. at 3 (emphasis added).) As noted earlier, however, Respondent did not raise this argument when he filed a return to LG Chem’s and LGCAI’s petition for writ of certiorari over a year ago. Instead, he opted to focus only on the issue of immediate appealability – wholly ignoring Petitioners’ arguments on the merits of its personal jurisdiction argument, the second issue clearly raised in the Petition. Respondent also did not raise the issue when he sought to dismiss the appeal by filing a motion instead of his Respondent’s brief on May 22, 2023. Respondent then included this argument in his Respondent’s Brief, filed on August 21, 2023. It was only after the Court struck his brief for failing to comply with the page limits that Respondent asked the Court to strike portions of LG Chem’s and LGCAI’s Final Brief as purportedly improper. Respondent’s challenge is therefore untimely, in addition to being unsupported by any rule and inconsistent with this Court’s grant of review.

Conclusion

There is no merit to Respondent’s motion. Petitioners ask that Respondent’s Motion to Strike and Stay be denied and that Respondent be directed to file an amended final brief without further delay.

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