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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-04969

Appellate Case No. 2013-001273

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf of all others similarly situated, ... Appellants,

v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, Glenn McConnell, in his official capacity as President of the South Carolina Senate, Representative Harry B. "Chip" Limehouse III, Senator George E. "Chip" Campsen, and the State of South Carolina, ... Respondents.

Motion to Strike Portions of Appellants' Initial Brief

Pursuant to Rules 208 and 240 of the South Carolina Appellate Court Rules, Respondent Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives ("Speaker Harrell"), moves this Court to strike portions of Appellants' Initial Brief set forth below. The basis for this motion is that Appellants include arguments on issues upon which the circuit court expressly and

unequivocally did not rule in the order on appeal. As a result, those arguments are not properly before this Court and cannot be included in Appellants' Initial Brief.

In the order appealed by Appellants, the circuit court granted Speaker Harrell's motion for summary judgment on one basis only—Appellants' lack of standing. See Order Granting Speaker Harrell's Motion for Summary Judgment and Dismissing Plaintiffs' Action in its Entirety, attached hereto as Exhibit A ("[Appellants] lack the standing necessary to challenge the constitutionality of Act 130 of 2007"). This ruling—Appellants' lack of standing—ruled on the only issue presented in Speaker Harrell's Motion for Summary Judgment. See Speaker Harrell's Motion for Summary Judgment, attached hereto as Exhibit B. While Appellants had filed a Motion for Summary Judgment on the merits of the action (the merits constituted the constitutional claims raised by Appellants), the circuit court expressly and unequivocally did not rule on those issues, stating in the order that it "decline[d] to rule on any other issues presented in this action." See Exhibit A at p. 17. Further, even if the circuit court had denied Appellants' motion for summary judgment on the merits of the case, the issues raised by Appellant would still not be proper for inclusion in the Initial Brief "because the denial of a motion for summary judgment is not appealable, even after final judgment." See Hembree v. One Thousand Eight Hundred Forty-Seven Dollars, U.S. Currency, 404 S.C. 241, 245-46, 743 S.E.2d 864, 866 (Ct. App. 2013) (holding Appellant could not appeal the denial of his summary judgment argument for that reason); see also Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003) (holding that "[t]his Court has repeatedly held that the denial of summary judgment is not directly appealable" and compiling cases holding same).

Appellants acknowledge that the circuit court did not rule on their constitutional claims. In their Initial Brief, Appellants admit that "[t]he circuit court **did not reach the merits** of the case." See Appellants' Initial Brief at p. 24 (emphasis added). Additionally, Appellants frame the issue to this Court as "[t]he circuit court erred **in failing to rule** that Act 130 was unconstitutional" and that "the Circuit Court's **failure to address the merits of the case** was error. Id. (emphasis added). Despite this admission, Appellants briefed the merits of the case for 18 pages in their Initial Appellants' Brief. Because the circuit court did not rule on these issues, the arguments presented on pages 24-42 of their Initial Brief and in the conclusion section on page 43 are improper and should not be considered by this Court.[1] This Court should strike these improper arguments in full, order Appellants to re-file their Initial Appellants' Brief without pages 24-42, and remove the references to the merits of the case found in paragraphs 2-3 of the conclusion.[2]

Moreover, this is not an instance where a party can appeal an otherwise non-appealable ruling along with an immediately appealable order. In such cases, the key is the circuit court **ruled** on both issues (the otherwise immediately appealable issue and the appealable issue). The appellate court can consider the non-appealable issue because the lower court actually provided a ruling to review on appeal. See, e.g., Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 516-17, 623 S.E.2d 387, 390 (2005)

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[1] The offending arguments in the conclusion are found in paragraph 2 of that section and the last half of the final section of the conclusion. Those references should be removed in full.

[2] The revised brief should remain substantively identical to the current brief but without pages 24-42.

(considering an **order** denying a motion to dismiss even though not directly appealable because an appealable order was before the court). Here, **no ruling or order** exists on the issues briefed by Appellants. Thus, there is no adverse lower court ruling on the merits for this Court to consider.

To allow these issues to remain in Appellants' Initial Brief would allow review of an issue not ruled on by the lower court. This is improper. A party cannot obtain a ruling in this first instance from this Court. This Court is an error correction court, not a fact finder. See S.C. Code Ann. § 14-8-200(a) ("This [Court's] jurisdiction shall be appellate only); Toal Vafai & Muckenfuss, Appellate Practice in South Carolina 2d, p. 12 ("The Court of Appeals is an error correction court . . . ."). With no ruling from the circuit court on the merits of this matter, there is no error for this Court to correct.

If this Court does not strike these arguments, Speaker Harrell and the other Respondents will be forced to expend significant time and incur substantial costs to respond to 18 pages of argument on issues for which this Court cannot offer relief. Moreover, this Court would expend significant time and resources considering arguments that have **no bearing**[3] on the issue before this Court, i.e., whether Appellants lack standing to pursue the constitutional issues in this case. This would waste significant judicial resources. Thus, it would be in the interest of judicial economy to strike these arguments at this time. Moreover, striking these arguments

[3] The merits of this case do not impact the Appellants' lack of standing. Standing is a threshold issue that must be addressed prior to delving into the merits of an action. See, e.g., Holden v. Cribb, 349 S.C. 132, 136, 561 S.E.2d 634, 637 (Ct. App. 2002) (holding that "a threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy" and that "[t]he concept of justiciability encompasses the doctrines of ripeness, mootness, and **standing**.").

would not preclude Appellants from raising these issues on remand to the circuit court and obtaining a ruling at that time should Appellants be found to have standing to raise them (which Speaker Harrell denies).

Therefore, the arguments on issues not ruled upon must be stuck from Appellants' Initial Brief. Speaker Harrell requests that the deadline for his Initial Respondent's Brief be stayed until this Court rules on this motion.[4]

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Columbia, South Carolina

September 6, 2013

[4] A stay of the deadline is necessary because Speaker Harrell will be unable to formulate a respondent's brief until he knows which arguments he will remain in Appellants' Initial Brief.

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APPEAL FROM CHARLESTON COUNTY
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South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf of all others similarly situated, ... Appellants,

v.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Robert W. Harrell, in his official capacity as Speaker of the South Carolina House of Representatives, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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September 6, 2013

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
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RE: South Carolina Public Interest Foundation, et al. v. Robert W. Harrell, Jr., in his official capacity as Speaker of the S.C. House of Representatives, et al.
Civil Action No.: 2012-CP-40-1589
SC Court of Appeals Case No.2013-001273
Our file no.: 38955/01500

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of a Motion to Strike Portions of Appellants' Initial Brief in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter I am hereby serving opposing parties.

Very truly yours,

Michael J. Anzelmo

MJA:jlee
Enclosures
cc: James G. Carpenter
Michael R. Hitchcock
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Robert E. Tyson, Jr.
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