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May 16 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Thomas W. McGee, III, Circuit Court Judge

Case No. 2021-CP-40-05620
Appellate Case No. 2025-000902

Sherman Green, ... Respondent,

v.

City of Columbia and George Simpson, ... Defendants

of whom
George Simpson is . . . . . Appellant.

PETITION FOR REHEARING

Pursuant to Rules 221(a), (c), and Rule 240, SCACR, Appellant George Simpson petitions the Court to rehear and reconsider its ruling on May 14, 2025, granting Respondent's Motion to Dismiss this appeal pursuant to *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994) (holding the denial of a motion for summary judgment is not immediately appealable). The Court summarily granted Respondent's Motion to Dismiss (the Motion is also dated May 14, 2023) without permitting Appellant an opportunity to file a Return to Respondent's Motion.[1] In

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[1] *See* Rule 240(e), SCACR ("Any party opposing a motion or petition *shall* have ten (10) days from the date of service thereof to file an original and six (6) copies of his return with the clerk ..."). *See, e.g.*, *State v. Price*, 441 S.C. 423, 895 S.E.2d 633 (2023) (use of the word "shall" in a statute means that the action is mandatory); *Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205,

doing so, the Court overlooked or misapprehended existing law that the order in this case is, in fact, an immediately appealable order pursuant to S.C. Code Ann. § 14-3-330 (2017).

Section 14-3-330 provides that an immediate appeal may be taken in a law case from:

> (1) *Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas* and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
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> (2) An order *affecting a substantial right* made in an action when such order (a) *in effect determines the action and prevents a judgment from which an appeal might be taken* or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
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> * * *
>
> 4) An interlocutory order or decree *in a court of common pleas* granting, continuing, modifying, or *refusing an injunction* or granting, continuing, modifying, or refusing the appointment of a receiver.

Section 14-3-330 (emphasis added). The order on appeal fits squarely within subparts (1), (2) and (3) of Section 14-3-330 and is, therefore, immediately appealable.

The Court of Common Pleas denied Appellant's assertion of qualified immunity as a defense to Plaintiff Sherman Green's claim for unlawful arrest pursuant to 42 U.S.C. § 1983. *See, e.g.*, *Behrens v. Pelletier*, 516 U.S. 299, 305-306 (1996) (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985) that a trial court's rejection of a defendant's qualified-immunity defense is a "final decision" subject to immediate appeal under 28 U.S.C. § 1291). The United States Supreme Court described the scope of protection afforded by qualified immunity:

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209 (2005) ("In interpreting the meaning of [procedural rules], the [c]ourt applies the same rules of construction used to interpret statutes.").

> * * * *Harlow[v. Fitgerald*, [457 U.S. 800 (1982)] and *Mitchell* make clear that the defense is meant to give government officials a right, not merely to avoid "standing trial," but also to avoid the burdens of "such *pretrial* matters as discovery ..., as '[i]nquiries of this kind can be peculiarly disruptive of effective government. *Mitchell*, *supra*, at 526, 105 S.Ct. at 2815 (emphasis added) (quoting from *Harlow*, *supra*, at 817, 102 S.Ct. at 2738). Whether or not a later summary judgment motion is granted, denial of a motion to dismiss is conclusive as to this right. We would have thought that these and other statements from *Mitchell* and *Harlow* had settled the point, questioned by Justice BREYER [in dissent], see *post*, at 844, that this right is important enough to support an immediate appeal. If it were not, however, the consequence would be, not that only one pretrial appeal could be had in a given case, as Justice BREYER proposes, but rather, that there could be no immediate appeal from denial of a motion to dismiss but only from denial of summary judgment. That conclusion is foreclosed by *Mitchell*, which unmistakably envisioned immediate appeal of "[t]he denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity." 472 U.S., at 527, 105 S.Ct., at 2816.

Behrens, 516 U.S. at 308. *See also Mitchell*, 472 U.S. at 526 (the immunity is entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal immunity question; the denial of a claim of qualified immunity, insofar as it turns on an issue of law, is an appealable "final decision" within the meaning of § 1291 notwithstanding the absence of a final judgment).

Section 14-3-330(1), therefore, permits an immediate appeal from an interlocutory ruling denying summary judgment on the legal issue of qualified immunity. The order involves the merits since it "finally determine[s] some substantial matter forming the whole or a part of some ... defense." *Mid-State Distr., Inc. v. Century Imp., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993).

Additionally, Section 14-3-330(2) permits immediate appeal of the order denying summary judgment under a qualified-immunity defense. The order affects a substantial right to avoid the burdens of litigation, including discovery, *Behrens*, and effectively determines the

defense by removing the benefits of that defense, rendering moot any effective appeal at the end of the case.

Finally, the order is in the nature of a court of common pleas order denying injunctive relief, *i.e.*, refusing to prevent the Plaintiff/Respondent from moving forward with the suit against Appellant, who is the individual officer. Section 14-3-330(4), therefore, permits an immediate appeal from the order.[2]

Other jurisdictions agree with the Supreme Court of the United States that an order denying the defense of qualified immunity, whether by denying a motion to dismiss or denying summary judgment, is immediately appealable. *See, e.g., Martinez v. Estate of Bleck*, 379 P.3d 315 (Colo. 2016) (Colorado's appealability statute permitted an immediate appeal of a ruling on qualified immunity regardless of how the issue is raised or the grounds of the decision); *City of Hialeah*, 661 So.2d 335 (Fla. 3rd Dist. Court of Appeal 1995) (citing *Mitchell v. Forsythe*, Florida Court of Appeal held denial of summary judgment based upon a claim of qualified immunity is subject to interlocutory review to the extent the order turns on an issue of law); *Harrod v. Caney*, 547 S.W.3d 536, 540 (Ky. 2018) (an order denying a claim of qualified

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[2] *Compare State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013) (holding an order in the Court of General Sessions denying immunity under S.C. Code Ann. § 16-11-410 to -450 (Supp. 2012) (the Protection of Persons or Property Act or "Stand Your Ground" law) is not an order involving the merits in that it does not finally determine a substantial cause of action or defense; it is also not an order under 14-3-330(4) since it emanates from the Court of General Sessions, not the Court of Common Pleas). Qualified immunity in the 1983 realm is different from asserting an immunity defense under § 16-11-410 to -450 since a criminal defendant may not appeal until sentence is imposed, and further the order is not an order denying an injunction in the Court of Common Pleas. *See, also, Isaac* at 188, 747 S.E.2d at 682 (in a concurring opinion, Justice Pleicones viewed the order as from the circuit court in general without distinguishing between Common Pleas and General Sessions and therefore immediately appealable; Justice Pleicones concurred in dismissal because the appellant in that case was not protected by the Act since the Act did not apply retroactively to his case).

immunity is immediately appealable); *Epps v. Duke Univ.*, 468 S.E.2d 846, 849 (N.C. App. 1996) (usually the denial of a motion for summary judgment is not immediately appealable; however, denial of a motion for summary judgment on the ground of qualified immunity is immediately appealable because the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action); *West Virginia State Police Dept. v. J.H.*, 856 S.E.2d 679, 688-689 (W.Va. 2021) (a circuit court's denial of a motion to dismiss that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the "collateral order" doctrine; the Court noted "one of the most salient benefits from qualified immunity is protection from pretrial discovery, which is costly, time-consuming, and intrusive," 856 S.E.2d at 688, and "deferring a ruling on qualified immunity acts as an effective denial of such protections" 856 S.E.2d at 689); *Littles v. Commissioner*, 832 N.E.2d 651 (Mass. 2005) (noting the denial of summary judgment on qualified immunity grounds was immediately appealable and holding the failure to immediately appeal the ruling waived the issue requiring dismissal of a subsequent appeal); *Lucero v. Mathews*, 901 P.2d 1115 (Wyo. 1995) (while it is generally true that a denial of summary judgment is not a final, appealable order, this is not the case in the context of qualified immunity).[3]

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[3] Arguably, a defendant would be required to take an immediate appeal of the denial of qualified immunity or forever lose the issue. Qualified immunity is the right not to be subjected to all aspects of litigation, including discovery. Failure to immediately appeal the ruling would render the right a nullity and preclude effective appellate review at the end of the case. The ruling is akin to the "mode of trial" interlocutory rulings that the Supreme Court has held not only may be appealed, but *must* be appealed immediately or the right is waived. *See, e.g., Neeltec Enterpises, Inc. v. Long*, 397 S.C. 563, 567, 725 S.E.2d 926, 928-929 (2012) (Supreme Court held order of substitution of party fell within the purview of § 14-3-330(2)(a) and therefore must be immediately appealed if it is to be considered at all; Court stated there is no review available after final judgment, that is, "failure to take such immediate appeal would bar consideration of the order in an appeal from final judgment"); *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d

Accordingly, the Court should grant this Petition, rehear this matter, reconsider its ruling, withdraw the order, and reinstate this appeal. Alternatively, because there is no controlling state law precedent in South Carolina on this issue, the Court may wish to request that, pursuant to Rule 204(b), SCACR, the Supreme Court certify the question of the appealability of an interlocutory order denying summary judgment on the grounds of qualified immunity.

Respectfully submitted,

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Attorneys for Appellant

May 16, 2025

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707 (2005) (order disqualifying party's chosen attorney is immediately appealable under § 14–3–330(2), and must be immediately appealed); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (order denying mode of trial to which appellant is entitled as a matter of right may be immediately appealed under § 14-3-330(2)(a), and the failure to take such an immediate appeal waives the issue).

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Sherman Green,.....Respondent,

v.

City of Columbia and George Simpson.....Defendants

of whom
George Simpson is.....Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, she served counsel for the Respondent with a copy of the Appellant George Simpson's *Petition for Rehearing* by email only to the following:

Brian R. Shealey, Jr., Esq.
Shealey Law Firm
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Luke A. Shealey, Esq.
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Kalen Reed, Paralegal to John S. Nichols

May 16, 2025
Columbia, South Carolina

Kalen Reed

From: Kalen Reed
Sent: Friday, May 16, 2025 1:47 PM
To: 'brian@shealeylaw.com'; Luke Shealey; Chris Truluck; 'william.hemlepp@columbiasc.gov'; 'jpavlicek@collinsandlacy.com'
Cc: John Nichols; Meredith Brown; Mary LaFave
Subject: Sherman Green v. City of Columbia and George Simpson/Appellate Case No. 2025-000902
Attachments: Ltr filing Petition for Rehearing.pdf; Petition for Rehearing.pdf; COS for Petition for Rehearing.pdf

Good afternoon,

Attached please find Appellant George Simpson's Petition for Rehearing as well as a certificate of service which are being served upon you in the above matter.

Thank you,

BLUESTEIN ATTORNEYS
Listening. Lawyering. Leading.

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The Honorable Jenny A. Kitchings
Clerk of the Court of Appeals
Court of Appeals of South Carolina
P.O. Box 11629
Columbia, SC 29211

RE: Sherman Green v. City of Columbia and George Simpson
Appellate Case No.: 2025-000902

Dear Ms. Kitchings:

Please be advised that I have been engaged to assist the Appellant George Simpson in the above matter. As such, enclosed for filing please find Appellant George Simpson's *Petition for Rehearing* in reference to the above matter. I have also enclosed a certificate of service upon counsel for the Respondent, and a check for the filing fee will be placed in the mail today. Please let me know if you need anything further.

With kind regards,

John S. Nichols

JSN/knr
Enclosures

cc: Brian R. Shealey, Jr., Esq.
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