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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable David P. Caraker, Jr.

APPELLATE CASE NO. 2026-000075

Sherica Powell.....Respondent,

v.

The South Carolina Ports Authority..... Appellant.

MEMORANDUM REGARDING APPEALABILITY OF INTERLOCUTORY ORDER

TABLE OF CONTENTS

<i>Section</i>	<i>Page</i>
Table of Authorities	3
Introduction	4
Factual Background	5
Standard Governing Interlocutory Appeals	5
The Denial of Sovereign Immunity Implicates Substantial Right	6
The Orders Are Final as to the Immunity Issues	9
Considerations of Public Policy Support Immediate Review	10
Conclusion	10

TABLE OF AUTHORITIES

Cases

South Carolina Cases

Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002)

Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993)

Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999)

Town of Summerville v. City of North Charleston, 378 S.C. 107, 662 S.E.2d 40 (2008)

Wade v. Berkeley Cty., 348 S.C. 224, 559 S.E.2d 586 (2002)

Persuasive Authority

Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334 (N.C. 2009)

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993)

Richmond Cty. Bd. of Educ. V. Cowell, 225 N.C. App. 583 (Ct. App. N.C. 2013)

Statutes and Rules

Ga. St. § 5-6-34(a)(15)

Fla. R. App. Proc. 9.130(a)(3)(C)(xi)

Rule 203(b)(1), SCACR

S.C. Code Ann. § 15-78-20

S.C. Code Ann. § 15-78-70(d)

S.C. Code Ann. § 14-3-330(2)

I. INTRODUCTION

The Circuit Court’s orders denying South Carolina Ports Authority’s (“SCPA”) Motion to Dismiss and subsequent Motion to Reconsider are immediately appealable. Although the orders are interlocutory, they conclusively reject SCPA’s assertion of sovereign immunity and a statutory bar under the South Carolina Tort Claims Act (“SCTCA”) and require SCPA to remain in litigation – the very right sovereign immunity protects against.

The Circuit Court’s rulings are not tentative or conditional; rather, they finally determine SCPA is not entitled to dismissal based on sovereign immunity or a statutory bar, and SCPA must continue to defend this action notwithstanding those asserted protections. In doing so, the Circuit Court expressly construed § 15-78-70(d) and controlling authority interpreting the statute and definitively determined that the settlement agreement at issue did not constitute a settlement “under the Act” as a matter of law.

Rule 203(b)(1), SCACR, permits immediate appellate review where postponement would defeat the right asserted, and the Circuit Court’s conclusive rejection of SCPA’s immunity defenses presents precisely that circumstance.

Because the orders finally resolve SCPA’s immunity defense and expose SCPA to continued litigation that SCPA contends the Circuit Court lacks authority to require, the orders affect a substantial right that may not be adequately protected by appeal from a final judgment. South Carolina appellate courts recognize that an order affecting a substantial right is immediately appealable where postponement of review would defeat the right asserted. Accordingly, the orders are immediately appealable under Rule 203(b)(1), SCACR.

II. FACTUAL BACKGROUND

On or about October 19, 2024, Respondent executed an agreement titled “SETTLEMENT AGREEMENT” naming SCPA as a party and a beneficiary of the agreement. (Ex A, Settlement Agreement). On January 24, 2025, Respondent filed suit against SCPA in Georgetown County Court of Common Pleas related to the same occurrence that gave rise to the settlement agreement. SCPA filed a Motion to Dismiss Respondent’s suit on the basis the suit was barred under the doctrine of sovereign immunity and Section 15-78-70(d) of the South Carolina Code. The Circuit Court denied SCPA’s Motion to Dismiss and SCPA timely filed a Motion to Reconsider, which was also denied. As a result, SCPA has filed this appeal.

III. GOVERNING STANDARD FOR INTERLOCUTORY APPEALS

Under Rule 203(b)(1), SCACR, appeals generally lie only from final judgments, unless an interlocutory order affects a substantial right. South Carolina appellate courts recognize that an interlocutory order affects a substantial right where postponement of appellate review until final judgment would defeat the right asserted or render it incapable of adequate protection. *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 333, 426 S.E.2d 777, 779 (1993).

A “substantial right” is one that cannot be adequately protected by appeal from final judgment. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 111-12, 662 S.E.2d 40, 42 (2008); *see* S.C. Code Ann. § 14-3-330(2). Where an interlocutory order conclusively determines a legal issue and delaying review would defeat the right asserted, immediate appellate review is appropriate. *Mid-State Distribs.*, 310 S.C. at 333, 426 S.E.2d at 779.

Thus, the focus of the appealability inquiry is not whether the underlying case remains pending, but whether the order finally resolves an issue that cannot be meaningfully reviewed after final judgment.

IV. THE DENIAL OF SOVEREIGN IMMUNITY IMPLICATES A SUBSTANTIAL RIGHT

A. Sovereign Immunity Protects Against Suit Itself

South Carolina law treats sovereign immunity as jurisdictional in nature. *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 333, 566 S.E.2d 536, 545 (2002). Specifically, the Court in *Faile* stated that South Carolina law treats sovereign immunity as a limitation on the authority of the courts to entertain suit against a governmental entity absent an express statutory waiver. *Id.* Because sovereign immunity limits the Court's authority to proceed, the denial of an immunity defense bears directly on whether a governmental entity may be required to continue defending an action notwithstanding its assertion of immunity. Any waiver of sovereign immunity must be strictly construed in favor of the governmental entity. *Steinke v. S.C. Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999).

Because sovereign immunity operates as a limitation on the court's authority to entertain suit, an order conclusively rejecting a governmental entity's immunity defense determines, as a practical matter, whether the entity must continue defending the action notwithstanding its assertion of immunity. *Faile*, 350 S.C. at 333, 566 S.E.2d at 545 (2002). Where a court has required a governmental entity to proceed through litigation after rejecting an immunity defense, the jurisdictional protection asserted is at risk of being undermined in a manner that may not be adequately remedied through post-judgment review.

Accordingly, where, as here, the Circuit Court conclusively rejects a governmental entity's assertion of sovereign immunity and declines to dismiss it from the action, the resulting order implicates a substantial right that may not be adequately protected by appeal from final judgment. *Mid-State Distributions*, 310 S.C. at 333, 426 S.E.2d at 779.

B. Section 15-78-70(d) Confirms the Substantial Nature of The Right at Issue

The SCTCA further underscores the substantial nature of the right asserted by SCPA. Section 15-78-70(d) provides that when a claimant enters into a settlement “under this chapter,” the settlement “constitutes a **complete bar to any action**” against the governmental entity arising out of the same occurrence. S.C. Code Ann. § 15-78-70(d) (emphasis added).

By employing mandatory and absolute language, providing that a qualifying settlement “constitutes a complete bar to any action” § 15-78-70(d) operates to foreclose further litigation against a governmental entity once the statute applies. In denying SCPA’s Motion to Dismiss and Motion to Reconsider, however, the Circuit Court conclusively determined, as a matter of law, that the settlement agreement executed by Plaintiffs did not constitute a settlement “under this Act,” notwithstanding that SCPA was *expressly named* as a party in the settlement agreement. In this case, the Circuit Court conclusively determined, as a matter of law, that § 15-78-70(d) does not apply and SCPA must remain in litigation. The Circuit Court’s determination fully and finally resolves SCPA’s statutory immunity defense and leaves no further issue for the Circuit Court to decide with respect to the availability of the statutory bar.

In fully and finally ruling against SCPA, the Circuit Court misinterpreted and misapplied *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002), *Wade* to resolve, as a matter of law, the availability of the statutory bar under § 15-78-70(d) to conclude that because the settlement was funded by a private insurer and characterized as a covenant not to execute, it could not, as a matter of law, constitute a settlement “under the Act” for purposes of § 15-78-70(d). In *Wade v. Berkeley County*, the South Carolina Supreme Court held that a covenant not to execute is a “settlement between the parties to the agreement” triggering the application of § 15-78-70(d). 348 S.C. 224, 228, 559 S.E.2d 586, 587-88 (2002). The Supreme Court held that “while a covenant

not to execute is not a release, it is nonetheless a settlement between the parties to the agreement” and that the court of appeals erred in ruling that § 15-78-70(d) does not apply to covenants not to execute. *Id.* at 229, 559 S.E.2d at 587.

But South Carolina law does not elevate form over substance in determining whether an agreement constitutes a settlement. Courts have recognized that covenants not to execute are treated as settlement agreements where they resolve liability arising from the same occurrence, even if payment is sourced from insurance or structured to preserve claims against other parties. In this case, the Circuit Court concluded that the agreement at issue could not constitute a settlement “under the Act” because it was characterized as a covenant not to execute and funded by a private insurer. That legal determination, based on the label and funding mechanism of the agreement rather than its operative effect, was dispositive of SCPA’s statutory immunity defense under § 15-78-70(d) and left no further issue for the Circuit Court to resolve on that question.

Furthermore, the *Wade* case is primarily distinguishable from the current facts because the governmental entity was not named on the settlement agreement in *Wade*. Here, SCPA was named in the settlement agreement as a party to the settlement agreement. The Circuit Court’s focus on the payor in *Wade* is misplaced and is not a consideration applicable to the § 15-78-70(d) analysis. Because § 15-78-70(d) provides that a qualifying settlement “constitutes a complete bar to any action” against a governmental entity, the statute operates to foreclose further litigation when it applies S.C. Code Ann. § 15-78-70(d). Where, as here, a Circuit Court conclusively rejects the applicability of that statutory bar based on its construction of governing precedent and the language of the settlement agreement itself, delaying appellate review until after final judgment risks depriving the governmental entity of a right that may not be adequately protected by post-judgment appeal. *Town of Summerville*, 378 S.C. 107, 111-12, 662 S.E.2d at 42 (2008).

V. THE ORDERS ARE FINAL AS TO THE IMMUNITY ISSUE

Although the underlying action remains pending, the orders denying SCPA's Motion to Dismiss and Motion to Reconsider are final as to the issue of sovereign immunity. The Circuit Court did not reserve the issue, defer its ruling, or identify any further factual development relevant to immunity. Instead, the court conclusively rejected SCPA's assertion of sovereign immunity and declined to dismiss SCPA from the action, leaving no further immunity-related issue for the Circuit Court to decide. That rejection rested on the Circuit Court's definitive construction of § 15-78-70(d) and its determination that the settlement agreement could not, as a matter of law, trigger the statutory bar.

An interlocutory order is immediately appealable if it finally determines a substantial matter forming the whole or a part of a cause of action or defense. *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 333, 426 S.E.2d 777, 779 (1993). Here, postponing review would require SCPA to continue litigating claims it contends are barred as a matter of jurisdiction, thereby risking irreparable loss of the asserted immunity.

Federal caselaw is in accord. Under federal law, the denial of sovereign immunity of a state, as reflected in the Eleventh Amendment, is an immediately appealable issue. *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

Neighboring states similarly recognize the importance of sovereign immunity and allow immediate appeals of the denial of its recognition. *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334 (N.C. 2009) (denial of sovereign immunity is a substantial right and immediately appealable); *Richmond Cty. Bd. of Educ. V. Cowell*, 225 N.C. App. 583 (Ct. App. N.C. 2013) (same); Ga. St. § 5-6-34(a)(15) (providing an immediate appeal from the denial of sovereign immunity); Fla. R. App. Proc. 9.130(a)(3)(C)(xi) (providing an immediate appeal from

the denial of sovereign immunity). As a result, the orders denying SCPA's sovereign immunity defense are final orders on the issue of sovereign immunity.

VI. POSTPONING REVIEW WOULD IRREPARABLY UNDERMINE PUBLIC POLICY

Considerations of public policy further support immediate appellate review of orders that conclusively reject a governmental entity's assertion of sovereign immunity, particularly where delaying review would require the expenditure of public resources on litigation that may ultimately be barred as a matter of law. Sovereign immunity reflects the principle that the scope of the State's exposure to suit is determined by legislative choice rather than judicial expansion. The South Carolina Supreme Court has explained that the scope of sovereign immunity and any waiver thereof is determined by the General Assembly, and that statutory waivers of immunity must be strictly construed. *Steinke*, 336 S.C. at 396, 520 S.E.2d at 154.

VII. CONCLUSION

The Circuit Court's orders denying SCPA's Motion to Dismiss and Motion to Reconsider conclusively reject SCPA's assertion of sovereign immunity and a statutory bar under the SCTA. Sovereign immunity is a substantial right that protects governmental entities from suit itself, not merely from liability. The Circuit Court's definitive determination that the settlement agreement at issue was not entered "under the Act" conclusively forecloses the statutory immunity defense absent appellate review. That right will be irreparably lost if appellate review is delayed until final judgment. Accordingly, the orders are immediately appealable under Rule 203(b)(1) SCACR, and this Court has jurisdiction to consider SCPA's appeal.

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Respectfully submitted,

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PROOF OF SERVICE

Pursuant to Rule 262(c)(3), SCACR, and Order No. 2024-04-24-01(d), I certify that I have served the Memorandum Regarding Appealability of Interlocutory Order on all counsel of record by electronic mail to the Respondent’s counsel of record utilizing counsel’s primary email address listed in the Attorney Information System, on January 22, 2026, as follows:

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