IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Honorable Edgar Warren Dickson, Circuit Court Judge

Case No. 2012-CP-18-2686

Aubrey Kate Durham,

Respondent,

v.

South Carolina Department of Transportation,

Appellant.

MEMORANDUM ADDRESSING RIPENESS OF APPEAL

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SC Court of Appeals

Caroline Cleveland, Esq., SC Bar No. 64253
Bob J. Conley, Esq., SC Bar No. 12243
Joshua D. Cagle, Esq., SC Bar No. 78180
CLEVELAND LAW, LLC
171 Church Street, Suite 310
Charleston, SC 29401
Telephone: (843)577-9626
Facsimile: (843)577-6672
ccleveland@clevelandlaborlaw.com
bconley@clevelandlaborlaw.com
jcagle@clevelandlaborlaw.com
Attorneys for Appellant

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
FOSTER LAW FIRM, L.L.C.
895 Island Park Drive, Suite 202
Charleston, SC 29492
Telephone: (843)972-0313
Facsimile: (888)519-0934
nbloodgood@fosterfoster.com
lsanders@fosterfoster.com
Attorneys for Respondent

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STATEMENT OF THE CASE

Respondent Aubrey Kate Durham ("Durham") filed suit against Appellant South Carolina Department of Transportation ("SCDOT") on November 29, 2012, asserting two causes of action pursuant to the laws of the South Carolina Human Affairs Commission ("SCHAC"): 1) discrimination in violation of S.C. Code § 1-13-80(A)(1), and 2) failure to provide a reasonable accommodation in violation of S.C. Code § 1-13-80(D)(2). Durham requested a jury trial in the Dorchester County Court of Common Pleas.

On March 3, 2013, SCDOT filed a Motion to Dismiss pursuant to Rule 12(b)(1) and (6), SCRCP, asserting that the Circuit Court did not have jurisdiction to hear Durham's claims because S.C. Code § 1-13-90(c) does not allow a private cause of action against a state agency.[1] SCDOT's Motion to Dismiss was denied on July 2, 2013, and its Motion to Alter or Amend was denied on November 26, 2013. On December 31, 2013, counsel for SCDOT received a letter from the Court of Appeals requesting SCDOT address whether its appeal is ripe for review. In response, SCDOT submits this memorandum.

ARGUMENT

I. THE CIRCUIT COURT'S ORDERS DEPRIVE THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION OF ITS STATUTORILY GUARANTEED "MODE OF TRIAL" AND, THEREFORE, THE CIRCUIT COURT'S ORDERS ARE IMMEDIATELY APPEALABLE.

In her Complaint, Durham admits that SCDOT is "an agency of the State of South Carolina." S.C. Code §1-13-90(c) is clear that the mode of trial "[f]or complaints asserting

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[1] "Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." Lake v. Reeder Const. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct.App.1998).

expressly or in substance a violation by a *state agency* . . . of § 1-13-80," is under the guidelines set forth in S.C. Code §1-13-90(c).(emphasis added). Furthermore, as stated in S.C. Code §1-13-90(c)(15), "[p]roceedings under this section shall be subject to the Administrative Procedures Act."

Notably, S.C. Code §1-13-90(d), the code section pertaining to alleged violations of SCHAC laws by *private* employers, allows complainants that have their administrative charge dismissed to bring an equitable action against the employer in circuit court. S.C. Code § 1-13-90(c), however, does not contain a provision that allows a complainant redress in circuit court.[2] Moreover, "[n]othing in [the SCHAC laws] may be construed to create a cause of action other than those specifically described in Section 1-13-90 of this chapter." S.C. Code § 1-13-100. Therefore, the sole method and "mode of trial" available to Durham is under the process and procedures set forth in S.C. Code § 1-13-90(c), not by way of a jury trial or equitable action in circuit court.

S.C. Code § 14-3-330(2) states that "[t]he Supreme Court shall have appellate jurisdiction . . . and shall review upon appeal [a]n order affecting a substantial right made in an action," and our Supreme Court has "repeatedly . . . held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)." Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). "[O]rders affecting the mode of trial affect substantial rights under S.C. Code Ann. §

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[2] At least one Court analyzing this subsection reached a similar conclusion. Ackelson v. Manley Toy Direct, LLC, 832 N.W.2d 678, 683 n.3 (Iowa 2013), *citing* S.C.Code §§ 1-13-90, -100 (2005)("Some states have statutes dealing with employment discrimination that do not create a private cause of action in district court.").

14-3-330(2) (1977) and must, therefore, be appealed immediately." Lester v. Dawson, 327 S.C. 263, 266, 491, S.E.2d 240, 241 (1997), *citing* Foggie v. CSX Transp. Inc., 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993) ("Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable."). Here, the Circuit Court's order deprives SCDOT of its statutorily guaranteed "mode of trial" because it forces SCDOT to have Durham's claims "tried" by a jury or the court, instead of resolving Durham's claims by the "mode of trial" mandated by S.C. Code Ann. § 1-13-90(c) - the Administrative Procedures Act.

"'Pursuant to § 14-3-330(2), this Court has held on numerous occasions that when a trial courts order deprives a party of a mode of trial to which it is entitled to as a matter of right, such order is immediately appealable.'"Salmonsen v. CGD, Inc., 377 S.C. 442, 452 - 453, 661 S.E.2d 81, 87 (2008), *citing* Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). Furthermore, SCDOT is required to appeal the Circuit Court's order because if an order affecting the "mode of trial" is not immediately appealed, the party loses the right to later appeal and the particular mode of trial is waived. Edwards v. Timmons, 297 S.C. 314, 316, 377 S.E.2d 97 (1988)(appellant's failure to appeal order referring case to master in equity could not challenge referral after entry of final order); Creed v. Stokes, 285 S.C. 542, 542-543, 331 S.E.2d 351, 351 (1985)(party cannot delay

appeal of referral of case to master in equity).[3]

Although SCDOT recognizes that Fulmer v. Cain, 380 S.C. 466, 670 S.E.2d 652 (2008), implies, without explicitly holding, that "the 'mode of trial' exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury," not allowing SCDOT an immediate appeal effectively forces it to submit to a "mode of trial" that is patently contrary to the "mode of trial" the legislature expressly created by statute. Fulmer, *quoting* Salmonsen, 377 S.C. at 461, 661 S.E.2d at 91 (J. Pleicones dissent).

CONCLUSION

S.C. Code §1-13-90(c) is clear that Durham's relief lies in the SCHAC and under the procedures of the Administrative Procedures Act. Forcing SCDOT to submit to a trial in Circuit Court, regardless of whether by judge or jury and regardless whether Durham's remedies sound in law or equity, deprives it of its statutorily created "mode of trial." Therefore, the Court of Appeals should allow SCDOT to proceed with its immediate appeal of the Circuit Court's Orders forcing SCDOT to submit to an unidentified mode and manner

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[3] Hypothetically, SCDOT could have waited until the Circuit Court ordered a specific mode of trial in the circuit court, either by jury trial or in equity, to file this appeal. However, doing so would not alter SCDOT's assertion because, as discussed in this Memorandum, either "mode of trial" in circuit court is equally wrong and inappropriate. Further, the Circuit Court's Orders do not establish the mode of trial the Circuit Court intends to utilize and S.C. Code Ann. § 1-13-90(c) is silent. Specifically, although S.C. Code § 1-13-90(d) authorizes an equitable trial in the circuit court for claims against *private* employers, S. C. Code § 1-13-90(c) and the Circuit Court's Orders are silent as to what mode of trial the case may proceed in circuit court. Although the Supreme Court's "traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case, . . . the mode of trial analysis indubitably includes the consideration of the availability of trial." Salmonsen, 377 S.C. at 453, 661 S.E.2d at 87.

of trial that, in any form, in circuit court is contrary to S.C. Code § 1-13-90(c).

Respectfully submitted,

Caroline Cleveland, Esq., SC Bar No. 64253
Bob J. Conley, Esq., SC Bar No. 12243
Joshua D. Cagle, Esq., SC Bar No. 78180
CLEVELAND LAW, LLC
171 Church Street, Suite 310
Charleston, SC 29401
Telephone: (843)577-9626
Facsimile: (843)577-6672
ccleveland@clevelandlaborlaw.com
bconley@clevelandlaborlaw.com
jcagle@clevelandlaborlaw.com
Attorneys for Appellant

Charleston, South Carolina

Date: 1/9/2014

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PROOF OF SERVICE OF MEMORANDUM ADDRESSING RIPENESS OF APPEAL

Caroline Cleveland, Esq.
Bob J. Conley, Esq.
Joshua D. Cagle, Esq.
CLEVELAND LAW, LLC
171 Church Street, Suite 310
Charleston, SC 29401
Telephone: (843)577-9626
Facsimile: (843)577-6672
Email: ccleveland@clevelandlaborlaw.com
bconley@clevelandlaborlaw.com
jcagle@clevelandlaborlaw.com
Attorneys for Appellant

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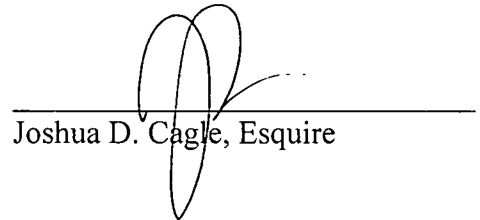
I hereby certify that on January 8, 2014, I served a copy of Appellant's Memorandum Addressing Ripeness of Appeal on the following:

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
FOSTER LAW FIRM, L.L.C.
895 Island Park Drive, Suite 202
Charleston, SC 29492
Attorneys for Respondent

by placing a copy of said document in the United States Mail with sufficient postage thereon.



Joshua D. Cagle, Esquire

Charleston, South Carolina

Date: 1/8/2014

CLEVELAND LAW, L.L.C.
LABOR AND EMPLOYMENT DEFENSE

ONE SEVENTY ONE CHURCH STREET, Suite 310
CHARLESTON, SOUTH CAROLINA 29401

CAROLINE WRENN CLEVELAND †
BOB J. CONLEY
JOSHUA D. CAGLE

†CERTIFIED SPECIALIST, LABOR & EMPLOYMENT LAW

TELEPHONE: (843) 577-9626
FACSIMILE: (843) 577-6672

January 8, 2014

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *Audrey Kate Durham v. South Carolina Department of Transportation*,
Civil Action No.: 12-CP-18-02686

Dear Ms. Kitchings:

Enclosed for filing is an original Memorandum Addressing Ripeness of Appeal. Also enclosed are the following:

(1) Proof of service of the Memorandum Addressing Ripeness of Appeal on the respondent;
(2) Six copies of the Memorandum Addressing Ripeness of Appeal; and,
(3) One additional copy of the Memorandum Addressing Ripeness of Appeal, that we are kindly requesting be filed with the court and returned to our attention using the enclosed envelope provided.

Yours truly,

CLEVELAND LAW, LLC

Joshua D. Cagle

JDC/jgb
Enclosure: as stated
cc: Nancy Bloodgood, Esquire

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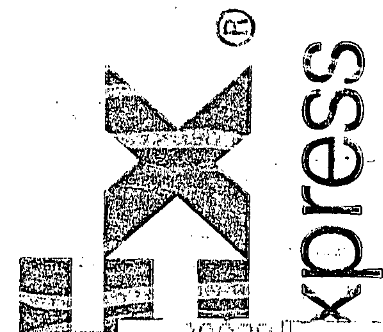

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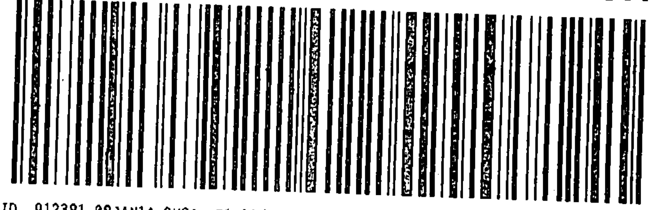

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