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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.

PETITION FOR REHEARING *EN BANC*

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SC Court of Appeals

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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 only two causes of action in her Complaint, both based upon alleged violations of the laws of the South Carolina Human Affairs Commission (“SCHAC”). Specifically, Durham alleges the following violations by SCDOT: 1) discrimination in violation of S.C. Code Ann. § 1-13-80(A)(1), and 2) failure to provide a reasonable accommodation in violation of S.C. Code Ann. § 1-13-80(D)(2). Durham, in her Complaint, 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), SCRCPP, asserting that the Circuit Court did not have jurisdiction to consider Durham’s claims because S.C. Code Ann. § 1-13-90(c), in conjunction with S.C. Code Ann. § 1-13-100, prohibits a private cause of action, legal or equitable, against a state agency for alleged violations of the SCHAC laws.¹ The Circuit Court denied SCDOT’s Motion to Dismiss on July 2, 2013, and subsequently denied SCDOT’s Motion to Alter or Amend on November 26, 2013.

On December 12, 2013, SCDOT filed its Notice of Appeal. Thereafter, on December 31, 2013, counsel for SCDOT received, by way of a letter from the Court of Appeals, a request that SCDOT address whether its interlocutory appeal is ripe for review. In response,

¹ “Lack of subject matter jurisdiction can be raised [and correspondingly addressed] 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).

SCDOT submitted its Memorandum Addressing Ripeness of Appeal on January 9, 2014. On March 3, 2014, the Court of Appeals issued a single paragraph order (the “Order”) dismissing SCDOT’s interlocutory appeal. SCDOT submits this Petition for Rehearing *En Banc*.²

ARGUMENT

I. THE ORDER INCORRECTLY RELIES SOLELY ON FULMER V. CAIN IN DISMISSING SCDOT’S APPEAL

In dismissing SCDOT’s appeal, the Order relies exclusively on Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008), and notes that Fulmer stands for the proposition that the “mode of trial exception to the general appealability rule ‘is confined to orders which abridge a party’s constitutional right to trial by jury.’” For the reasons below, however, the exclusive reliance on Fulmer in the Order is incorrect and leads to an inappropriate result.

First, and notably, in deciding Fulmer, the South Carolina Supreme Court did not expressly overrule or reject the reasoning in prior opinions addressing a party’s right to pursue an interlocutory appeal when the party’s “mode of trial” is affected.³ Furthermore, the Fulmer Court did not overturn prior opinions *requiring* parties to immediately appeal an

² SCDOT incorporates into its Petition for Rehearing *En Banc* the legal arguments and reasoning set forth in its Memorandum Addressing Ripeness of Appeal.

³ The opinions preceding Fulmer include the following: Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005); Salmonsens v. CGD, Inc., 377 S.C. 442, 452 - 453, 661 S.E.2d 81, 87 (2008); Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000).

order affecting the “mode of trial.”⁴ The cases preceding Fulmer do not expressly limit the right to an immediate appeal to situations where a party is deprived of a jury trial.⁵ As the South Carolina Supreme Court has not overturned the opinions, the Court of Appeals should consider the reasoning contained in them, grant SCDOT’s petition for rehearing *en banc*, and subsequently allow SCDOT’s interlocutory appeal to proceed.

The only opinion expressly overturned by Fulmer is Truluck v. Snyder, 362 S.C. 108, 606 S.E.2d 792 (Ct.App.2004). The basis for the South Carolina Supreme Court overturning Truluck was because, contrary to the decision in Truluck, jury trials are an available mode of trial in the probate court. Fulmer at 470, 670 S.E.2d at 654.

In this case, however, the Court of Appeals should recognize and be guided by the Salmonson majority that specifically recognized the following: the South Carolina 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, . . . [but regardless] the mode of trial analysis indubitably includes the consideration of the availability of trial.” Salmonsens, 377 S.C. at 453, 661 S.E.2d at 87. In this appeal, SCDOT requests a rehearing *en banc* so that

⁴ The prior opinions being the following: 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.”); Edwards v. Timmons, 297 S.C. 314, 316, 377 S.E.2d 97 (1988)(appellant failing 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).

⁵ See footnote 4.

the Court can consider and determine the “availability of trial” to Durham in circuit court, and her corresponding request for a jury trial in circuit court.⁶

Second, Fulmer is not directly applicable to SCDOT’s interlocutory appeal in this case. In particular, Fulmer addressed whether final orders of the probate court are appealable and, in doing so, the Fulmer court appropriately noted that “[t]he cases of this Court permitting an appeal from the denial of the mode of trial to which a party is entitled are distinguishable.” Fulmer, 380 S.C. at 470, 670 S.E.2d at 654(citing Salmonsens v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008); Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000); Hagood v. Somerville, 362 S.C. 191, 607 S.E.2d 707 (2005); Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985)).

Fulmer, moreover, reviewed the issue of whether the plaintiff was entitled to a jury trial in circuit court. In comparison, SCDOT asserts that Durham is not entitled to any trial in circuit court - legal or equitable. As noted by the Court in Flagstar, the traditional “analysis proceeds by determining 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.” Flagstar, 341 S.C. at 74, 533 S.E.2d at 333. In Durham’s circumstance, however, the traditional analysis is seemingly inapplicable. Instead, the seminal issue is that as a former employee of a state agency, Durham is required to proceed under the process, procedure, and “mode

⁶ In the event SCDOT’s interlocutory appeal is deemed improper and Durham’s case is remanded to the circuit court, Durham’s request for a jury trial, if granted by the circuit court, would be in contradiction of the recognition in Salmonsens that both the denial of a party’s right to a jury trial *and* an erroneous requirement that a party proceed before a jury in an equity case are equally in violation of a party’s right to a specific mode of trial.

of trial” provided to her by S.C. Code Ann. § 1-13-90(c).

For these reasons, SCDOT petitions this Court for a rehearing *en banc* so that the Court of Appeals may appropriately address SCDOT’s interlocutory appeal.

II. IN THE ALTERNATIVE, IF THE COURT OF APPEALS DISMISSES SCDOT’S INTERLOCUTORY APPEAL, THE COURT OF APPEALS SHOULD ADDRESS THE NOVEL ISSUE RAISED BY SCDOT IN THE INTEREST OF JUDICIAL ECONOMY

In the alternative, if the Court does dismiss SCDOT’s interlocutory appeal, it should, nonetheless, directly address the issue of whether Durham is entitled to pursue a private cause of action against SCDOT, either legal or equitable, in the circuit court. Addressing the issue now, as opposed to later, will promote judicial economy. See Ex parte Wilson, 367 S.C. 7, 14, 625 S.E.2d 205, 208 (2005)(“Although, we dismiss the order as not immediately appealable, we address this novel issue in the interest of judicial economy.”).

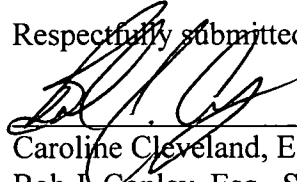
Whether the SCHAC laws, S.C. Code Ann. § 1-31-10 et seq., allow an employee (or former employee) of a state agency, like Durham in this case, alleging a violation of the SCHAC laws to pursue a private cause of action against a state agency has not been addressed by South Carolina’s appellate courts. Addressing this issue of statutory interpretation now, as opposed to after discovery and a trial, promotes judicial economy and efficiency, and saves the parties’ significant time and resources.

CONCLUSION

For the reasons discussed above and in SCDOT’s Memorandum Addressing Ripeness of Appeal, SCDOT requests that the Court of Appeals grant SCDOT’s Petition for Rehearing *En Banc*. Alternatively, SCDOT requests that the Court of Appeals address the issues raised

by SCDOT in the interest of judicial economy.

Respectfully submitted,



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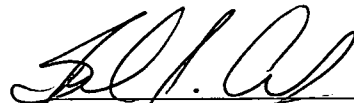
MAR 17 2014

SC Court of Appeals

I hereby certify that on March 14, 2014, I served a copy of the Appellant's Petition
for Rehearing *En Banc* the following:

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



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March 14, 2014

VIA FEDERAL EXPRESS

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,
Appellate Case No.: 2013-002695

Dear Ms. Kitchings:

Enclosed for filing is an original Petition for Rehearing *En Banc*. Also enclosed are the following:

- 1) Original proof of service of the Petition for Rehearing *En Banc* on Respondent;
- 2) Original and six copies of the Petition for Rehearing *En Banc*;
- 3) One additional copy of the Petition for Rehearing *En Banc* that we request be filed with the Court and returned to our attention using the enclosed, self-addressed envelope; and,
- 4) A \$25.00 check for the filing fee.

Yours truly,

CLEVELAND & CONLEY, LLC



Bob J. Conley

BJC/jgb

Enclosures: as stated

cc: Nancy Bloodgood, Esquire

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