

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Honorable Edgar Warren Dickson, Circuit Court Judge

Appellate Case No. 2013-002695 (Order Filed May 22, 2014)

Audrey Kate Durham,.....Respondent,

v.

South Carolina Department  
of Transportation,.....Petitioner.

APPENDIX

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Attorneys for Petitioner

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S.C. Supreme Court

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Honorable Edgar Warren Dickson, Circuit Court Judge

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Appellate Case No. 2013-002695 (Order Filed May 22, 2014)

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v.

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**APPENDIX**

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Attorneys for Respondent

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IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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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.

---

NOTICE OF APPEAL

---

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Attorneys for Appellant

TO THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Appellant South Carolina Department of Transportation ("SCDOT") hereby appeals the Order of the Honorable Edgar Warren Dickson, dated June 26, 2013, and filed with the Dorchester County Clerk of Court on July 2, 2013, denying SCDOT's Motion to Dismiss. (Exhibit A.) Appellant received written notice of the entry of final judgment in the case on July 5, 2013, and, thereafter, served a Motion to Amend or Alter Judgment on July 10, 2013.

The Motion to Amend or Alter Judgment was subsequently filed on July 11, 2013, and the Honorable Edgar Warren Dickson issued an Order dated November 21, 2013, and filed with the Dorchester County Clerk of Court on November 26, 2013, denying SCDOT's Motion to Amend or Alter Judgment. (Exhibit B.) SCDOT's counsel received written notice of the Order denying SCDOT's Motion to Amend or Alter Judgment on December 2, 2013. SCDOT hereby appeals the Order denying its Motion to Amend or Alter Judgment.

In summary, SCDOT hereby appeals the Orders denying its Motion to Dismiss (Exhibit A) and its Motion to Amend or Alter Judgment (Exhibit B).

[Signatures on Following Page]

Respectfully submitted,



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Attorneys for Appellant

Charleston, South Carolina

Date: 12/12/13

Other Counsel of Record:

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Attorneys for Respondent

# EXHIBIT A

STATE OF SOUTH CAROLINA  
COUNTY OF DORCHESTER

Audrey Kate Durham,  
Plaintiff,

vs.

South Carolina Department of  
Transportation,  
Defendant.

IN THE COURT OF COMMON PLEAS FOR  
THE FIRST JUDICIAL CIRCUIT

Case No.: 2012-CP-18-2686

ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS

FILED  
2013 JUL -2 PM 11:10  
COURT OF COMMON PLEAS  
DORCHESTER COUNTY

Plaintiff filed this case on November 29, 2012 and alleged two (2) causes of action: disability discrimination in violation of S.C. Code § 1-13-80(A)(1) and failure to provide reasonable accommodations in violation of S.C. Code § 1-13-80(D)(2). Defendant filed a Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b) (6), SCRCP on the basis that the Court lacked subject matter jurisdiction. Specifically, Defendant alleges there is no private cause of action against the state for discrimination because S.C. Code § 1-13-90 (c) requires the South Carolina Human Affairs Commission (SCHAC) to investigate charges of discrimination against a state agency and either issue an order awarding damages or an order dismissing the complaint.

Defendant's Motion to Dismiss was heard before me on April 1, 2013 in the Dorchester County Courthouse. Present at the Motion Hearing were counsel for Plaintiff, Nancy Bloodgood, and counsel for Defendant, Bob J. Conley. After reviewing the pleadings, briefs and exhibits submitted by each party, case law, and hearing oral argument from counsel, I make the following findings of fact and conclusions of law.

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## I. FINDINGS OF FACT

1. Plaintiff filed a charge of discrimination with the South Carolina Human Affairs Commission on March 19, 2012 and was issued a Right to Sue letter from the South Carolina Human Affairs Commission on September 21, 2012. (Compl. ¶¶ 5-6.)
2. Plaintiff alleges she is a qualified individual with a disability within the meaning of S.C. Code § 1-13-30(S). (Compl. ¶¶ 11-13.)
3. Plaintiff alleges Defendant could have provided reasonable accommodations for Plaintiff but refused to do so even though doing so would not have been an undue hardship. (Compl. ¶¶ 14, 25-26, 33, 40-46.)
4. Plaintiff alleges Defendant discriminated against Plaintiff on the basis of her disability by terminating her from her job on February 29, 2012. (Compl. ¶¶ 20-22, 29-32, 35, 38-41.)
5. Plaintiff also alleges Defendant discriminated against Plaintiff on the basis of Plaintiff's record of disabilities related to Plaintiff's back injuries and diagnosis of diabetes. (Compl. ¶¶ 15-17, 23-25, 27, 50.)

## II. STANDARD OF REVIEW

When ruling on a motion to dismiss pursuant to Rule 12(b) (6) of the South Carolina Rules of Civil Procedure, "the circuit court must base its ruling solely upon the allegations set forth on the face of the complaint" and must deny the motion "if the facts alleged in the complaint and the inferences drawn therefrom would entitle the plaintiff to relief under any theory." *Charleston County Sch. Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011) (citing *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 66-67, 651 S.E.2d 305, 307 (2007)). "[P]leadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties." *Id.* (quoting *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005)).

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### III. LEGAL ARGUMENT

South Carolina prohibits employment discrimination on the basis of one's disability and also mandates that employers, including state agencies, provide reasonable accommodations to qualified individuals with disabilities. S.C. Code § 1-13-80. The South Carolina State Human Affairs Commission (SCHAC) was created to "eliminate and prevent discrimination because of race, religion, color, sex, age, national origin, or disability," to "encourage fair treatment for, and to eliminate and prevent discrimination against [members of protected classes] and to foster mutual understanding and respect among all people in this State." S.C. Code §§ 1-13-20, 1-13-40(a). SCHAC has the power to promulgate regulations in accordance with the provisions of the South Carolina Human Affairs Law, formulate policies to effectuate the purposes of this chapter, and to cooperate with the EEOC to achieve the purposes of the Civil Rights Act of 1964. S.C. Code §1-13-70(c), (d), and (k). SCHAC also has the power to investigate problems in human affairs in the State. S.C. Code §1-13-70(n). SCHAC has promulgated regulations and these regulations "shall be liberally constructed to effectuate the purpose and provisions of [the South Carolina Human Affairs Law] and the policies of the South Carolina Human Affairs Commission." S.C. Code Regs. 65-12.

According to S.C. Code Ann. Section 1-13-90, upon receipt of a complaint against an entity of the State of South Carolina, the Commission *shall* issue an order for an internal hearing. However, no internal hearing was conducted in this case and it is this Court's understanding that, although the Legislature has given SCHAC the express statutory obligation to carry out this process, no internal hearing has ever been conducted, due to lack of funding or other considerations. Instead, SCHAC regularly issues "Notices of Right to Sue," intending that the complainant seek redress in SC Circuit Court.

Here, SCHAC did not issue an order for an internal hearing, which order is a prerequisite for administrative review under the statute. S.C. Code § 1-13-90 (c). Rather, a Notice of Right to Sue

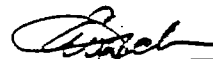
3/4 ~~8~~

was issued. The Notice of Right to Sue states that Plaintiff has a right to sue Defendant and must do so within one year from the alleged violation or within one hundred twenty (120) days from the date of the issuance of the Notice of Right to Sue, *or the right to sue will be lost*. Plaintiff complied with these time constraints. The Notice also states that SCHAC is terminating any further processing of the charge of discrimination and that the charging party (Plaintiff) can contact SCHAC's Staff Attorney for "advice on which Circuit Court has jurisdiction to hear [her] case."

Because SCHAC has apparently *never* conducted internal hearings, a strict reading of the statutes, as suggested by the Defendant, would effectively leave a complainant with *no redress* for even an admittedly egregious violation of her rights. The Court finds that the remedial nature of the statutes and a liberal construction thereof require the Court to allow some form of redress for the Plaintiff. As such, the Court is denying the Defendant's Motion to Dismiss.

Based on the language of the policies and purposes of the South Carolina Human Affairs Law, the this Court finds the Legislature did not intend for these statutes to be interpreted in a way that would completely shield state agencies from lawsuits alleging discrimination based on a protected class and denies Defendant's Motion to Dismiss. The Court hereby also grants the Plaintiff leave to amend her Complaint, if desired, to add the South Carolina Human Affairs Commission as a party to this action.

AND IT IS SO ORDERED!



The Honorable Edgar Warren Dickson  
Judge for the First Judicial Circuit

Orangeburg, South Carolina

Date: 6/26/13

4/4

STATE OF SOUTH CAROLINA  
COUNTY OF DORCHESTER  
IN THE COURT OF COMMON PLEAS

Audrey Kate Durham

CERTIFIED COPY

2013 JUL -2 PM 12:48

*Charles A. ...*  
CLERK OF COURT  
DORCHESTER COUNTY

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2012CP1802686

Department Of  
Transportation South  
Carolina

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:  
ORDER INFORMATION

This order  ends  does not end the case.  
Additional Information for the Clerk: \_\_\_\_\_

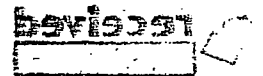
**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.



Edgar Dickson  
Circuit Court Judge

2153  
Judge Code

7/2/2013  
Date

For Clerk of Court Office Use Only

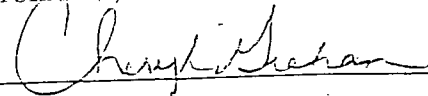
This judgment was entered on 7/2/2013, and a copy mailed first class or placed in the appropriate attorney's box on 7/2/2013, to attorneys of record or to parties (when appearing pro se) as follows:

✓ Nancy Bloodgood 895 Island Park Drive Ste 202 Charleston, SC 29492

Caroline Wrenn Cleveland 171 Church St., Ste. 310 Charleston, SC 294013140  
Bob J. Conley 171 Church St., Ste. 310 Charleston, SC 29401  
Joshua Drew Cagle One Seventy One Church Street Suite 310 Charleston, SC 29401

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Cheryl Graham - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

# EXHIBIT B

STATE OF SOUTH CAROLINA FILED - RECORD IN THE COURT OF COMMON PLEAS FOR  
COUNTY OF DORCHESTER 2013 NOV 26 ) AM 11:53 THE FIRST JUDICIAL CIRCUIT

Audrey Kate Durham, )  
Plaintiff, )  
 )  
vs. )  
 )  
South Carolina Department of )  
Transportation, )  
 )  
Defendant. )  
 )

CHERYL BRANHAM  
CLERK OF COURT Case No.: 2012-CP-18-2686  
DORCHESTER COUNTY

ORDER DENYING DEFENDANT'S  
MOTION TO ALTER OR AMEND  
JUDGMENT

2013 NOV 26 AM 11:54  
CLERK OF COURT  
DORCHESTER COUNTY

FACTUAL BACKGROUND

Defendant filed a Motion to Dismiss which was heard by me on April 1, 2012 in the  
Dorchester County Courthouse. Present at the Motion Hearing were counsel for Plaintiff, Nancy  
Bloodgood, and counsel for Defendant, Bob J. Conley. Defendant moved to dismiss Plaintiff's  
disability discrimination claim pursuant to Rule 12(b) (6), SCRCF on the basis that the Court  
lacked subject matter jurisdiction. Specifically, Defendant alleged there is no private cause of  
action against the State for discrimination by a State employee because S.C. Code § 1-13-90 (c)  
requires the South Carolina Human Affairs Commission (SHAC) to investigate charges of  
discrimination against a state agency and either issue an order awarding damages or an order  
dismissing the complaint. Defendant alleged subject matter jurisdiction for Plaintiff's claims lies  
exclusively with SHAC and not with any circuit court. Here, Plaintiff received a Notice of Right  
to Sue from SCHAC dated September 21, 2012 stating, "If you intend to *sue* the Respondent  
named in your charge .....You may contact the SHAC representative named above if you have  
any questions about your legal rights including *advice on which Circuit Court has jurisdiction to  
hear your case.*" (emphasis added).

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After reviewing the pleadings, briefs and exhibits submitted by each party, case law, and hearing oral argument from counsel, I issued an Order dated June 26, 2013, and filed July 2, 2013, denying Defendant's Motion to Dismiss. Thereafter, Defendant filed a Motion to Alter or Amend the Judgment. After due deliberation, review of the filed memoranda, case law and exhibits and arguments of counsel, and incorporating herein the findings of fact and conclusions of law made in my previous Order Denying Defendant's Motion to Dismiss, Defendant's Motion to Alter or Amend the Judgment is denied.

#### STANDARD OF REVIEW

Pursuant to Rules 52(a) and 59(e) of the South Carolina Rules of Civil Procedure, a party may file a motion requesting that the Court alter or amend its judgment. SCRCP 52(a) and 59(e). The motion may request that the Court amend its findings or make additional findings. SCRCP 52(a). The motion must be served on all parties and sent to the judge within ten day after the moving party receives written notice of the entry of the order. SCRCP 59(e),(g).

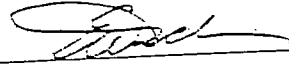
#### LEGAL ARGUMENT

The Court believes that its order denying dismissal of this law suit was proper based on the facts alleged in, and inferences from, the Complaint and the language of Human Affairs Law itself. The Court further believes that it properly addressed Defendant's subject matter jurisdiction claim when it stated that "the remedial nature of the statutes and a liberal construing thereof require the Court to allow some form of redress for the Plaintiff." The Circuit Court is South Carolina's Court of general jurisdiction. Because the Court found that the Legislature intended a plaintiff like Ms. Durham to have a remedy for an alleged injury, and a remedy is not available through an internal hearing, the Court believes it does have jurisdiction over this case. The Court declines to alter its prior decision holding that Ms. Durham is entitled to bring her claim in this Court. Further, in permitting Ms. Durham to bring a discrimination court in

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circuit court after SHAC has issued a Notice of Right to Sue, the Court is not improperly creating an unintended private cause of action or denying SCDOT the statutorily mandated mode of trial.


AND IT IS SO ORDERED!



The Honorable Edgar Warren Dickson  
Judge for the First Judicial Circuit

Orangeburg, South Carolina

Date: 11/21/13

3/3 

STATE OF SOUTH CAROLINA  
COUNTY OF DORCHESTER  
IN THE COURT OF COMMON PLEAS  
Audrey Kate Durham

CERTIFIED COPY  
2013 NOV 26 AM 11:07

*Audrey K. Durham*  
CLERK OF COURT  
DORCHESTER COUNTY

Department Of  
Transportation South  
Carolina

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	
DISPOSITION TYPE (CHECK ONE)	

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
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 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court.

**ORDER INFORMATION**

This order  ends  does not end the case.  
Additional Information for the Clerk: \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

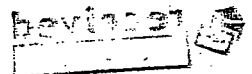
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

2153

11/26/2013



Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

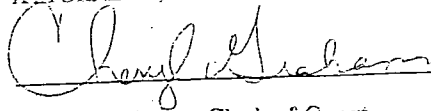
This judgment was entered on 11/26/2013, and a copy mailed first class or placed in the appropriate attorney's box on 11/26/2013, to attorneys of record or to parties (when appearing pro se) as follows:

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Bob J. Conley 171 Church St., Ste. 310 Charleston, SC 29401  
Joshua Drew Cagle One Seventy One Church Street Suite 310 Charleston, SC 29401

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Cheryl Graham - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Multiple horizontal lines for additional information.

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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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.

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PROOF OF SERVICE OF NOTICE OF APPEAL

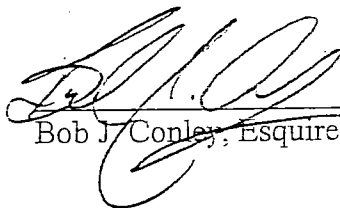
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Attorneys for Appellant

I hereby certify that on December 12, 2013, I served a copy of the Notice 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.



Bob J. Conley, Esquire

Charleston, South Carolina

Date: 12/12/13



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1836  
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December 30, 2013

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Re: Aubrey K. Durham v. SCDOT  
Appellate Case No. 2013-002695

Dear Counsel:

This Court has received your notice of appeal. A preliminary review of the orders challenged on appeal indicates they might not be appealable.

Accordingly, it is requested that you serve and file a memorandum addressing the issue of appealability within ten (10) days of the date of this letter. The time limits for perfecting the appeal are held in abeyance pending the Court's consideration of the memorandum.

Very truly yours,

*V. Claire Allen, Deputy*

CLERK

cc: Nancy Bloodgood, Esquire  
Lucy Clark Sanders, Esquire

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

JAN 09 2014

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

**SC Court of Appeals**

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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## 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.<sup>1</sup> 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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<sup>1</sup> “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.<sup>2</sup> 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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<sup>2</sup> 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.” Salmonsens v. CGD. Inc., 377 S.C. 442, 452 - 453, 661 S.E.2d 81, 87 (2008), *citing* Flagstar Corp. v. Roval 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).<sup>3</sup>

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 Salmonsens, 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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<sup>3</sup> 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.” Salmonsens, 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,



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# The South Carolina Court of Appeals

Aubrey Kate Durham, Respondent,

v.

South Carolina Department of Transportation, Appellant.

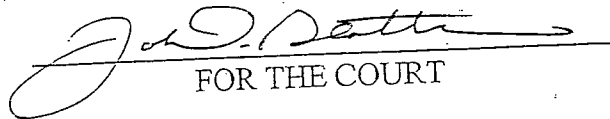
Appellate Case No. 2013-002695

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## ORDER

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This Court requested memoranda from the parties addressing whether the underlying order is immediately appealable. After careful consideration, this appeal is dismissed. *See Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (noting 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" (citation and internal quotation marks omitted)).

  
FOR THE COURT

Columbia, South Carolina

cc:

Nancy Bloodgood  
Lucy Clark Sanders  
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Joshua Drew Cagle

FILED  
3/3/14

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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## 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.<sup>1</sup> 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,

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<sup>1</sup> "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*.<sup>2</sup>

## 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.<sup>3</sup> Furthermore, the Fulmer Court did not overturn prior opinions *requiring* parties to immediately appeal an

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

<sup>3</sup> 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.”<sup>4</sup> 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.<sup>5</sup> 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.” Salmonson, 377 S.C. at 453, 661 S.E.2d at 87. In this appeal, SCDOT requests a rehearing *en banc* so that

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<sup>4</sup> 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).

<sup>5</sup> 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.<sup>6</sup>

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

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<sup>6</sup> 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.”).

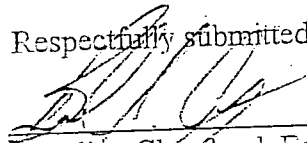
Whether the SCHAC laws, S.C. Code Ann. § 1-31-10 et seq., allow an employee (or former employee) of a state agency, like Durham in this case, alleging a violation of the SCHAC laws to pursue a private cause of action against a state agency has not been addressed by South Carolina’s appellate courts. 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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Attorneys for Appellant

Charleston, South Carolina

Date: 3/14/17

# The South Carolina Court of Appeals

Aubrey Kate Durham, Respondent,

v.

South Carolina Department of Transportation, Appellant.

Appellate Case No. 2013-002695

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## ORDER

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Appellant has filed what this Court construes as a petition for rehearing from this Court's March 3, 2014 order, which dismissed this appeal. After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul G. Shortz J.

John O. Smith J.

Joseph W. Curston A.J.

Columbia, South Carolina

cc:

Nancy Bloodgood, Esquire  
Lucy Clark Sanders, Esquire  
Caroline Wrenn Cleveland, Esquire

FILED

5/22/14

Bob J. Conley, Esquire  
Joshua Drew Cagle, Esquire

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Honorable Edgar Warren Dickson, Circuit Court Judge

Appellate Case No. 2013-002695 (Order Filed May 22, 2014)

Audrey Kate Durham,.....Respondent,

v.

South Carolina Department  
of Transportation,.....Petitioner.

**PROOF OF SERVICE OF APPENDIX TO PETITION FOR WRIT OF  
CERTIORARI**

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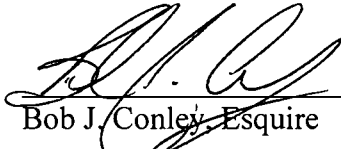
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I hereby certify that on June 18, 2014, I served a copy of the Appendix to Petition for Writ of Certiorari on the following:

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

  
\_\_\_\_\_  
Bob J. Conley, Esquire

Charleston, South Carolina

Date: 6/18/14