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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This matter comes before the Court as a result of a Motion to Dismiss filed by Petitioner on March 3, 2013. The Motion to Dismiss was filed pursuant to Rule 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. The Honorable Edgar W. Dickson considered the motion, memoranda, and argument of counsel and denied the Motion on July 2, 2013. Judge Dickson thereafter denied Petitioner's Motion to Alter or Amend on November 26, 2013.

After filing its Notice of Appeal, Petitioner was asked to brief the issue of appealability to the Court of Appeals and attempted to frame the underlying Order as a denial of its substantial right to a certain mode of trial. The Court of Appeals rejected this argument and held that Judge Dickson's Order Denying Petitioner's Motion to Dismiss was not immediately appealable. Notably, Petitioner's Motion to Dismiss did not raise the issue of "mode of trial" and Judge Dickson was not asked to examine the availability of a certain mode of trial or make a ruling regarding this issue. Judge Dickson's Order (and subsequent Order Denying Petitioner's Motion to Alter or Amend) simply held that Respondent's Complaint should not be dismissed for lack of subject matter jurisdiction or failure to state facts sufficient to constitute a cause of action. These were the grounds upon which Petitioner sought dismissal of Respondent's Complaint and Judge Dickson properly ruled on these issues. Petitioner first raised a "mode of trial" argument in its Motion to Alter or Amend. Thereafter, Judge Dickson's Order Denying Petitioner's Motion to Alter or Amend briefly mentioned "mode of trial," but did not base its denial of Petitioner's Motion on this basis. Both of Judge Dickson's Orders were based on the grounds upon which Petitioner requested

dismissal--specifically that Respondent's Complaint should be dismissed pursuant to SCRCP Rule 12(b)(1) and 12(b)(6).

The Order of the Court of Appeals presents no novel questions of law but is instead a simple reiteration of the law of our State The Court did not write a full opinion on this matter nor did any Judges dissent. Petitioner has failed to submit any cases from the South Carolina Supreme Court or United States Supreme Court which directly conflict with the Court of Appeals' Order The Court of Appeals made a simple determination that the Lower Court's Order is not immediately appealable based on the laws of our State. Nothing in this Order warrants review by this Court and Respondent respectfully requests that this Petition be denied and this case be remanded and allowed to proceed in Circuit Court.

ARGUMENT

Respondent replies to Petitioner's Questions Presented for Review which are restated, verbatim, below.

I. Does the Court of Appeals erroneously rely on *Fulmer v. Cain* in holding that the South Carolina Department of Transportation is not entitled to immediately appeal the trial court's order affecting its guaranteed "mode of trial?"

Petitioner argues that the Lower Court's denial of its Motion to Dismiss is immediately appealable based on S.C. Code §14-3-330(2)(a) which states that the Supreme Court shall review.

> 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.

As stated in this statute, only final orders which determine an action (and prevent a judgment from which an appeal could later be taken) or discontinue an action are immediately

appealable. The reasoning is simple; an order which "ends" an action must be subject to immediate review or the aggrieved party would never have the ability to seek appellate review. However, South Carolina case law has long interpreted orders denying a party's substantial right to a certain "mode of trial" as an exception to this rule. Even though these orders are not "final" and do not end a case, they are subject to immediate appeal.

The case law interpreting the "mode of trial" exception to the general appealability rule centers around whether a jury trial has been improperly granted or denied. Quite simply, this issue was not raised to the Lower Court in Petitioner's Motion to Dismiss. The Lower Court was not asked to determine whether Respondent had a right to a jury trial and, consequently, made no ruling on this issue.[1] As such, the Court of Appeals correctly dismissed Petitioner's appeal Notably, Petitioner admits that the Lower Court has never made a ruling regarding whether Respondent is entitled to a jury trial or a bench trial. (*See* Petition for Writ of Certiorari, n.8 and Petitioner's Memorandum in Support of Appealability, n.3)

The Court of Appeals did not erroneously rely on *Fulmer v Cain,* 380 S.C. 466, 670 S.E.2d 652 (2008), in reaching its conclusion that Petitioner's appeal should be dismissed. Petitioner sought appellate review on the basis that its required mode of trial had been denied and the Court of Appeals correctly decided that Petitioner's argument was without merit.

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[1] Petitioner added this argument to its Motion to Alter or Amend but the argument was not before the Lower Court in Petitioner's original Motion to Dismiss. Petitioner has never filed a Motion to Strike Respondent's Request for a Jury Trial. Judge Dickson's Order Denying Petitioner's Motion to Alter or Amend briefly addressed the "mode of trial" argument but only in one sentence and only in the context of Petitioner's original Motion to Dismiss. In his Order Denying Petitioner's Motion to Alter or Amend, Judge Dickson still found that subject matter jurisdiction existed and Respondent had properly stated a cause of action upon which relief could be granted.

Petitioner has not been denied a jury trial and, further, Petitioner never asked the Lower Court to determine whether this matter should be tried by a jury or a judge. *Fulmer v Cain* is one of many cases which examine the mode of trial exception and the Court's reliance on *Fulmer* was not misplaced.

Fulmer confirmed what many cases had already held, "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." *Id* at 470, 670 S.E.2d at 654 (*citing Salmonsen v CGD, Inc.*, 377 S.C 442, 461, 661 S.E 2d 81, 91 (2008)). *Fulmer* continues to be the current law in regards to this issue. Petitioner is correct that *Fulmer* did not expressly reverse other cases in which our courts have held that the mode of trial exception also applies to orders denying a party's request for a bench trial. However, by citing the dissent of Justice Pleicones in its holding, the *Fulmer* Court indicated that it supports this narrower view of the mode of trial exception

Fulmer has not been overruled by a subsequent opinion from this Court.[2] Thus, the Court of Appeals' reliance on *Fulmer* was proper and does not warrant review by this Court. At most, there is arguably some uncertainty as to whether the "mode of trial" exception only applies to orders denying a party's right to a jury trial or also applies to orders requiring a party to submit to a jury trial (such as an order denying a party's request that a case be transferred to the Master In Equity or to the non-jury roster) Regardless, the question is still inapplicable and misplaced here The underlying order in this case was an Order Denying

[2] In *Frampton v SCDOT*, 406 S.C 377, 752 S.E.2d 269 (2013), the Court of Appeals held that SCDOT lost its ability to appeal the denial of its motion to transfer the case to the non-jury roster by not immediately appealing the order. However, *Frampton* was decided by the Court of Appeals, not this Court, and a Petition for Writ in *Frampton* is currently pending in

Petitioner's Motion to Dismiss. In its Motion to Dismiss, Petitioner asked the Court to determine whether Respondent had stated a cause of action and whether the Court had subject matter jurisdiction over the action. Judge Dickson's Order decided these issues and is not immediately appealable as it is not a final order which discontinued the action or finally determined the action such that no other judgment could be later entered and appealed. *See Woodard v Westvaco,* 319 S C. 240, 460 S.E.2d 392 (1995) (order denying a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable because it does not finally determine anything). After the fact, Petitioner has attempted to craft Judge Dickson's order into an order which denies its substantial right to a certain mode of trial. However, no mode of trial has been denied and the Order is not otherwise any type of final order that is immediately appealable pursuant to S.C. Code §14-3-330.

Petitioner relies heavily on a sentence from *Salmonsen v CGD, Inc.*, 377 S.C. at 453, 661 S.E.2d at 87, in which this Court stated, "the mode of trial analysis indubitably includes the consideration of the availability of trial." However, *Salmonsen* is distinguishable from this case and Petitioner attempts to read this sentence much too broadly. The lower court order at issue in *Salmonsen* extinguished the "availability of trial" for some class members because the underlying orders created a "class action anomaly" wherein the claims of certain putative class members were completely barred as a result of an order which (in the middle of litigation) switched the class action to an opt-in class action after the putative class members had already missed the applicable statute of limitations. *Id.* at 452-53 (Court agreed that the order establishing an opt-in notification process was immediately appealable because it was a "death knell for a number of class members' claims because they will no longer be

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this Court.

class members due to the inhibitions created by changing the matters to an opt-in class" and "some of the claims of the putative class members are barred or would be barred by the statute of limitations if the 'opt-in' procedure is used"). As a result of the switch to an opt-in class, these potential plaintiffs were denied any type of trial and any opportunity to adjudicate their claims. Thus, the Court in *Salmonsen* held that the order changing the class to an opt-in class was immediately appealable because it denied these potential plaintiffs access to any trial, hearing, or opportunity to adjudicate their claims; essentially it was a "final order" in regards to these potential plaintiffs. The issue before the Court here is easily distinguishable. No party has been denied the ability to adjudicate their claims and Judge Dickson's Order is in no way a final order which ends or discontinues the case or decides the merits of the case. Contrary to the class action anomaly present in *Salmonsen*, no party's availability to trial has been taken away. The merits of the case will be decided as the case proceeds and later orders can be appealed at the proper time The Order at issue here is simply a denial of Petitioner's Motion to Dismiss and is not immediately appealable pursuant to the "mode of trial" exception or any other law.

II. Do the trial court and Court of Appeals' orders force the South Carolina Department of Transportation to submit to a "mode of trial" in direct contravention of South Carolina statutory provisions and correspondingly deny the South Carolina Department of Transportation the "mode of trial" mandated by statute?

As explained in the above response to Question Presented No. I, Petitioner did not initially include a "denial of mode of trial" argument to the Lower Court or ask the Lower Court to determine whether Petitioner was entitled to a jury trial. Petitioner added this argument to its Motion to Alter or Amend and the Court briefly addressed it in the last

sentence of its Order Denying Petitioner's Motion to Alter or Amend but only in the context of Petitioner's underlying and original request for relief (the request that Respondent's Complaint be dismissed pursuant to SCRCP Rule 12(b)(1) and 12(b)(6)). It is Respondent's position that Judge Dickson's Orders were well reasoned and correct based on applicable law and not immediately appealable, Respondent also submits that the Court of Appeals did not err in finding that Judge Dickson's Order was not immediately appealable Thus, despite Petitioner's attempt to craft Judge Dickson's Order as a denial of Petitioner's substantive right to a certain mode of trial, a Writ should not be granted in these circumstances

If Petitioner desires to strike Respondent's request for a jury trial, Petitioner can file a motion seeking such relief and the Court can make its determination in response to the parties' briefs and applicable case law. Petitioner seeks to skip this procedural step and urges the Court to treat Judge Dickson's denial of Petitioner's Motion to Dismiss as a denial of its "mode of trial." In support of its plea, Petitioner submits that it will later file a Motion to Strike and appeal the Lower Court's ruling on that motion no matter how the Lower Court rules. The Lower Court may hypothetically decide in Petitioner's favor on this future motion, but Petitioner attempts to precipitately address this argument by threatening to appeal the ruling no matter what the Lower Court decides (See n.8 of Petition for Writ, "if the Circuit Court allows Durham to move forward with a jury trial . . . SCDOT will be required to again appeal . . . [and] if the Circuit Court determines that a jury trial is not available and SCDOT must participate in a non-jury trial, SCDOT will also be compelled to again appeal such ruling.") Clearly, such action would be improper as Petitioner can only appeal if its requested action (striking a jury trial request) is denied and this denial aggrieves Petitioner in some way.

The crux of Petitioner's substantive argument to this Court (albeit misplaced and improper from a procedural standpoint because the Lower Court already ruled on these arguments in an Order which is not immediately appealable) is that it has been denied its substantial right to have this matter adjudicated through an internal hearing conducted by the South Carolina Human Affairs Commission ("SCHAC") pursuant to the Administrative Procedures Act. As Judge Dickson found in his Order, the Circuit Court has subject matter jurisdiction over these claims and Respondent has properly stated a cause of action because the statute at issue (S.C Code § 1-13-90(c)) states that the Administrative Procedures Act only applies when an internal hearing is ordered and conducted by SCHAC. Here, SCHAC did not order or conduct an internal hearing but instead ordered that Respondent proceed in Circuit Court if she wished to adjudicate her claims. Judge Dickson's findings did not deny Petitioner a "statutorily mandated mode of trial" because SCHAC had already issued Respondent a "Right to Sue" in Circuit Court.

Petitioner also attempts to obtain review by this Court by stating that the matter is a novel issue. Petitioner cites to *Salmonsen* in support of this argument, but *Salmonsen* is distinguishable The Court in *Salmonsen* decided to review the underlying order because, despite being an order which is not usually immediately reviewable, the order barred the claims of some class members and extinguished their ability to adjudicate their claims. As has already been discussed, the Lower Court Order here does not bar any claims, make any final judgments, or determine the merits of the case; it is simply a denial of a Motion to Dismiss. Further, the denial is not noteworthy enough to warrant the granting of a Writ for purposes of judicial economy. The statues at issue state that the Administrative Procedures Act should be used in an internal hearing, but no internal hearing was ever conducted Thus,

Respondent proceeded to Circuit Court to adjudicate her claims, as instructed by SCHAC As already determined by the Lower Court, the Circuit Court has jurisdiction over this matter because "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." (Order, p. 8.)

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari and remand this case to the Lower Court

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I, Nancy Bloodgood, Esquire, certify that on July 9, 2014, I served a copy of the **Return to Petition for Writ of Certiorari** via First Class Mail by placing a copy of said documents in the United States mail with sufficient postage thereon to the following:

Bob J. Conley, Esquire
Cleveland & Conley, L.L.C.
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Charleston, SC 29401

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

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REPLY TO CHARLESTON

July 9, 2014

The Honorable Daniel Shearhouse
Clerk, South Carolina Supreme Court
1231 Gervias Street
Columbia, SC 29211

RE: *Audrey Kate Durham v South Carolina Department of Transportation*
Appellate Case No : 2013-002695
Our File No.: 10119.0000

Dear Mr. Shearhouse,

Enclosed please find an original unbound and seven (7) copies of the Return to Petition for Writ of Certiorari and Proof of Service regarding the above-referenced matter. Please return a clocked-in copy of the same to my office. I have enclosed a self-addressed stamped envelope for your convenience

With kindest regards, I am

Sincerely,

Nancy Bloodgood

Nancy Bloodgood

NB/alk
Enclosures

cc. Katie Durham
Bob J. Conley, Esquire, Cleveland & Conley, L.L.C

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