

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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S.C. 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.

**REPLY TO RESPONDENT'S RETURN TO PETITIONER'S PETITION FOR A  
WRIT OF CERTIORARI**

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## REPLY

Respondent Audrey Kate Durham (“Durham”) filed a Return (“Return”) to Petitioner South Carolina Department of Transportation’s (“SCDOT”) Petition for Writ of Certiorari. SCDOT received Durham’s Return on July 11, 2014, and offers this Reply.

In her Return, Durham argues that SCDOT did not raise the “mode of trial” issue in the Circuit Court.<sup>1</sup> SCDOT, however, in its Motion to Dismiss, implicitly raised the “mode of trial” argument because the “mode of trial” argument is explicitly intertwined with SCDOT’s argument regarding lack of subject matter jurisdiction: Durham is statutorily barred from proceeding pursuant to any “mode of trial” in Circuit Court. Regardless, however, of how the argument was framed, SCDOT’s Motion to Dismiss was based on its contention that the Circuit Court did not have jurisdiction over alleged violations of the laws of the South Carolina Human Affairs Commission (“SCHAC”) by an employee (or, in Durham’s case, former employee) of a state agency because any such employee must proceed under the “mode of trial” the General Assembly explicitly provided for in S.C. Code Ann. § 1-13-90(c).

However, notwithstanding her noted contentions, Durham concedes that SCDOT did raise the “mode of trial” argument and the Circuit Court ruled on the argument in issuing its

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<sup>1</sup> Though Durham repeatedly argues that SCDOT did not explicitly raise the “mode of trial” argument in its Motion to Dismiss, Durham failed to raise the issue with the Court of Appeals or otherwise respond to SCDOT’s Memorandum Regarding Appealability or SCDOT’s Petition for Rehearing *En Banc*. Moreover, the Court of Appeals Order dismissing SCDOT’s appeal does not mention and is not based upon a finding that SCDOT did not properly preserve the “mode of trial” exception for appellate review.

Order Denying SCDOT's Motion to Alter or Amend Judgment.<sup>2</sup> Therefore, contrary to Durham's argument, the issue was properly before the Court of Appeals and is properly before this Court.

In her Return, Durham centers her argument around an assertion that the case law surrounding the "mode of trial" exception to the general appealability rule is limited only to circumstances when a party's constitutional right to a jury trial has been abridged.<sup>3</sup> However, for the reasons noted and discussed in SCDOT's Petition, Fulmer is the only case to make such a holding and, in so holding, Fulmer did not limit or overturn prior case law to the contrary. Durham, notably, concedes the point and recognizes 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."<sup>4</sup>

Even recognizing that Fulmer did not overturn prior case law to the contrary, Durham urges this Court to deny SCDOT's Petition and adopt the narrow view presented in Fulmer, arguing that SCDOT's appeal is not ripe because the trial court has yet to determine whether the case should be tried by judge or by jury. Durham's assertion fails, however, because any trial in the Circuit Court (judge or jury) directly deprives SCDOT of its statutorily guaranteed

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<sup>2</sup> Order Denying Motion to Alter or Amend Judgment, pp. 2 - 3. ("Further, in permitting Ms. Durham to bring a discrimination [claim] in circuit court after [SCHAC] has issued a Right to Sue, the Court is not improperly creating an unintended private cause of action or denying SCDOT the statutorily mandated mode of trial.").

<sup>3</sup> Return, P. 3.

<sup>4</sup> Return, P. 4.

“mode of trial,” as expressly contained in S.C. Code Ann. § 1-13-90(c). Because Fulmer did not overturn or expressly reject the reasoning and holdings in prior case law, including cases from this Court, SCDOT’s Petition for Writ of Certiorari should be granted.

Further, while Durham concedes and expressly acknowledges that there is “uncertainty” about whether the “mode of trial” exception only applies to orders requiring a party to submit to a jury trial, she, nonetheless, states that this uncertainty is irrelevant and inapplicable because SCDOT failed to properly raise the “mode of trial” issue with the Circuit Court. However, as discussed previously, the issue was raised in the Circuit Court and the Circuit Court ruled on the issue. Therefore, SCDOT’s argument that it has been denied its guaranteed “mode of trial” is properly before the Court and the Court should grant SCDOT’s Petition for Writ of Certiorari to clarify the “uncertainty,” as acknowledged and recognized by Durham, surrounding the “mode of trial” exception to the general appealability rule.

Durham, in her Return, also argues that the “mode of trial” issue in this case is not a novel issue and, therefore, is not noteworthy enough to warrant the Court granting SCDOT’s Petition. Durham, however, is wrong because no South Carolina appellate court has ever addressed the issue raised by SCDOT in this case.<sup>5</sup>

Finally, in concluding her Return, Durham quotes the Circuit Court and states that

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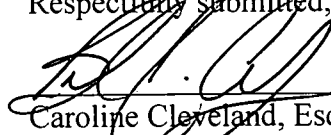
<sup>5</sup> Durham contends that the Circuit Court’s Orders did not deny SCDOT a statutorily mandated “mode of trial” because SCHAC already issued Durham a Right to Sue notice. However, the issue is irrelevant to SCDOT’s Petition because SCHAC, regardless of its actions, cannot circumvent the General Assembly or act in direct contravention of a clear and unambiguous statute, in particular S.C. Code Ann. § 1-13-90(c).

“the Legislature did not intend for these statutes [i.e., S.C. Code Ann. § 1-31-90(c)] to be interpreted in a way that would completely shield state agencies from lawsuits alleging discrimination based on a protected class.” However, Durham, and the Circuit Court, are wrong because S.C. Code Ann. § 1-13-90(c) is clear and unambiguous, and “[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). As with S.C. Code Ann. § 1-13-90(c), “[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Id. (citing In re Vincent J., 333 S.C. 233, 509 S.E.2d 261, 262 (1998)).

### CONCLUSION

For the reasons stated above and in SCDOT’s Petition for Writ of Certiorari, SCDOT asks the Court grant its Petition for Writ of Certiorari.

Respectfully submitted,



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Date: July 17, 2014

IN THE STATE OF SOUTH CAROLINA  
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**PROOF OF SERVICE OF PETITIONER'S REPLY TO RESPONDENT'S  
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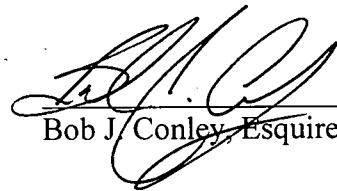
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I hereby certify that on July 17, 2014, I served a copy of Petitioner's Reply to Respondent's Return to Petitioner's Petition for a Writ of Certiorari on the following:

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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: 7/17/14