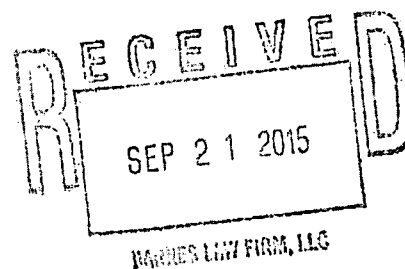


THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 14-CP-07-723



Brad Lightner, individually, and on behalf of all others similarly situated ... Respondent,

v.

Hampton Hall club, Inc., State of South Carolina, South Carolina  
Department of Revenue, Beaufort County and John Doe, ..... Defendants,

of whom State of South Carolina and  
South Carolina Department of Revenue are ..... Petitioners.

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**PETITION FOR EXTRAORDINARY RELIEF INCLUDING  
WRIT OF CERTIORARI AND REQUEST FOR STAY**

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Alan Wilson  
Attorney General

Courtney E. Lowell  
Assistant Attorney General (Bar No. 77175)  
Post Office Box 11549  
Columbia, South Carolina 29211  
803-734-3177  
[clowell@scag.gov](mailto:clowell@scag.gov)  
Attorney for Petitioner  
State of South Carolina

Tasha B. Thompson  
Counsel for Litigation (Bar No. 76415)  
[Tasha.Thompson@dor.sc.gov](mailto:Tasha.Thompson@dor.sc.gov)  
Milton G. Kimpson (Bar No. 7917)  
General Counsel for Litigation  
[Milton.Kimpson@dor.sc.gov](mailto:Milton.Kimpson@dor.sc.gov)  
Post Office Box 12265  
Columbia, South Carolina 29211-9979  
803-898-5131  
Attorneys for Petitioner South Carolina  
Department of Revenue

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South Carolina Department of Revenue are..... Petitioners.

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**PROOF OF SERVICE**

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I, Jean M. O'Connor, do hereby affirm that I have caused to be mailed, via United States Postal Service, postage prepaid, a copy of the State of South Carolina and the South Carolina Department of Revenue's Petition for Extraordinary Relief Including Writ of Certiorari and Request for Stay to William F. Barnes, III, Esquire PO Box 457, Hampton, SC 29924-0457; Teri A. Finger, Esquire, PO Box 24005, Hilton Head Island, SC 29925-4005; Mary Bass Lohr, Esquire, PO Box 40, Beaufort, SC 29901; and Kathleen C. Barnes, PO Box 897, Hampton SC 29924 this 16<sup>th</sup> day of September 2015.


  
Jean M. O'Connor

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Petitioners, State of South Carolina (State) and South Carolina Department of Revenue (Department) respectfully submit this Petition for Extraordinary Relief to include a Writ of Certiorari and Request for Stay, along with a Memorandum of Law and Authorities, pursuant to S.C. Const. art. V, § 5, S.C. Code Ann. § 14-3-310 and Rule 245, SCACR. The Petitioners request that this Court issue its Writ of Certiorari to review decisions of the lower court and to stay proceedings in the lower court until the Court determines whether it will grant this petition.

### **STATEMENT OF THE CASE**

This action was commenced by Plaintiff Brad Lightner (Plaintiff or Respondent) representing a putative class of South Carolina citizens against Defendants Hampton Hall Club, Inc. (Hampton Hall), the State of South Carolina, the South Carolina Department of Revenue, Beaufort County, and unknown defendants named as "John Doe". Hampton Hall Club, Inc., is alleged to be a non-profit corporation that provides memberships in consideration for yearly dues. The Plaintiff alleges that Hampton Hall has improperly collected admissions taxes pursuant to S.C. Code Ann. § 12-21-2420 and Beaufort County Ordinance #66-53 and has remitted said taxes to the Department and Beaufort County, respectively. The Plaintiff further alleges that he is exempt from such taxes and that the Department has been unjustly enriched by the wrongful collection of these taxes. Among other relief, the Plaintiff seeks reimbursement of the admission taxes he has paid.

In response to the Plaintiff's Amended Complaint, the Department filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCPP, or in the alternative, to strike pursuant to Rule 12(f), SCRCPP, to dismiss the State of South Carolina as a party, and to Stay Discovery Responses. The bases for the Department's motions were that Title 12,

Chapter 60 of the South Carolina Code, Revenue Procedures Act, S.C. Code Ann. § 12-60-10, et seq. (RPA) outlines the exclusive recourse available to the Plaintiff against the Department as to any allegations of the illegal or wrongful collection of taxes and the Plaintiff has failed to exhaust the administrative remedies therein, and further, that S.C. Code Ann. § 12-60-80(C) of the RPA precludes the Department from being named as a defendant in a class action suit. The Department's motion to strike class action allegations was similarly grounded in § 12-60-80(C). As the agency in South Carolina charged with the responsibility of administering State tax laws, it was further argued that the Department, and not the State, was the appropriate party to be named in a lawsuit seeking a refund of taxes.

In response to the Department's motion, the Plaintiff alleged that the legislative intent of the Revenue Procedures Act, particularly, S.C. Code Ann. § 12-60-20, as amended in 2007, limited the scope of the RPA to apply only to a dispute with the Department that concerns property taxes. Given that the instant dispute concerns admissions taxes, the Plaintiff asserted that the RPA does not apply and therefore, the RPA's administrative procedures need not be exhausted. The Plaintiff further asserted that because the RPA does not apply, § 12-60-80(C) which is contained in the RPA, does not bar the Department from being named a defendant in the instant class action suit.

A hearing was held before the Circuit Court on June 16, 2015. In its initial order, dated July 9, 2015, the Circuit Court denied the Department's motion to dismiss for failure to exhaust RPA remedies finding that the RPA only applied to disputes with the Department concerning property taxes (July 9, 2015 Order). Nevertheless, the Circuit Court dismissed the Department and the State from the action based upon the

prohibitions against class actions contained in § 12-60-80(C). The Plaintiff thereafter filed a Rule 59(e), SCRCP Motion to Reconsider, Alter or Amend the July 9, 2015 order. After entertaining written proposed orders from the parties, the Circuit Court issued its Order Denying Plaintiffs' Motion to Reconsider on July 12, 2015 (Order on Reconsideration).<sup>1</sup> Despite its heading, however, the Order on Reconsideration afforded the Plaintiff certain relief, essentially reinstating the State and Department as parties to the Plaintiff's lawsuit brought in his individual capacity and suggesting that other plaintiffs could file individual lawsuits over this issue:

Finally, to clear up any confusion from the July 9 order, the Court finds that the Plaintiffs may proceed as an individual against all Defendants, to include the SCDOR and the State of South Carolina, without the necessity of exhausting administrative remedies. The class action allegations against the SCDOR and the State of South Carolina are ordered dismissed.

Order on Reconsideration, p. 3.

It is from the Circuit Court's ruling – first announced in the July 9, 2015 Order and restated in the subsequent Order on Reconsideration -- that the Plaintiff(s) need not exhaust administrative remedies under the RPA in the context of a challenge to the legitimacy of a state tax collection and the companion prayer for a state tax refund that the State and the Department seek this Court's review by way of Writ of Certiorari.<sup>2</sup>

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<sup>1</sup>The Order Denying Plaintiff's Motion to Reconsider was mailed by the Circuit Court on August 14, 2015 and received by the Department on August 17, 2015. The Order was filed with the Beaufort County Clerk of Court on August 21, 2015.

<sup>2</sup>The State and the Department readily acknowledge that the denial of a Rule 12(b)(6), SCRCP Motion to Dismiss is typically not reviewable by an appellate court on direct appeal. See, Burkley v. Noce, 398 S.C. 35, 37, 726 S.E.2d 229,230 (SC Ct. App. 2012) ("Generally, the denial of a motion to dismiss under Rule 12(b)(6), SCRCP, is not

**A WRIT OF CERTIORARI IS APPROPRIATE HERE TO REVIEW THE LOWER COURT'S RULING ON THE APPLICABILITY OF THE REVENUE PROCEDURES ACT**

The Petitioners seek to invoke the original jurisdiction of this Court under its inherent power to issue a Writ of Certiorari to review the Circuit Court's ruling. S.C. Const. art. V, § 5 states in pertinent part that "[t]he Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs." The General Assembly has codified this constitutional authority in § 14-3-310 using the same language as found in S.C. Const. art. V, § 5.

This Court granted a Writ of Certiorari in the case, In re Breast Implant Product Liability Litigation, 331 S.C. 540, 503 S.E.2d 445 (1998), to review a trial court's denial of the defendants' motions to dismiss causes of actions based in strict liability, breach of implied warranties and breach of express warranty. In discussing its rationale for granting certiorari, the Court observed:

Although we will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal, a writ of certiorari may be issued when exceptional circumstances exist. This matter presents such a case. Novel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions are involved in this matter. A decision by this Court would serve the interests of judicial economy by eliminating numerous inevitable appeals raising these issues.

Id., 331 S.C. at 554, 503 S.E. 2d at 452, fn 2. See also, Oncology and Hematology Associates of S.C., LLC v. South Carolina Department of Health and Environmental

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immediately appealable.") Nevertheless, as will be explained, the RPA issue raised by the Circuit Court's ruling is particularly appropriate for review on Writ of Certiorari.

Control, 387 S.C. 380, 381, 692 S.E.2d 920, 921 (2010) (Although appeal of discovery order was dismissed as interlocutory, “we [Supreme Court] determined exceptional circumstances existed, warranting the grant of a writ of certiorari.”); Laffitte v. Bridgestone Corporation, 381 S.C. 460, 674 S.E. 2d 154 (2009) (Writ of Certiorari issued to review discovery order where “case presents such exceptional circumstances as it involves a novel question of law in a matter that has been the subject of numerous claims in state and federal courts. A decision by this Court at this time best serves the interests of judicial economy by eliminating the numerous inevitable appeals raising this novel issue of significant public interest.”).

The Circuit Court’s ruling that the RPA is not applicable in the instant case because it is not a dispute with the Department concerning property taxes creates the kind of exceptional circumstances that make it appropriate for this Court to exercise review. The Circuit Court’s interpretation limiting the scope of the RPA is novel, and is inconsistent with the leading cases in which exhaustion of administrative remedies under the RPA has been required by the courts. Furthermore, a Writ of Certiorari in this case is appropriate given the great public interest in maintaining an efficient means to address tax and regulatory issues of all types with the Department. A ruling that the RPA is limited to only those cases involving disputes with the Department over property taxes deprives taxpayers who have disputes with the Department over other tax types such as sales taxes and income taxes, as well as regulatory matters, of the “straightforward remedy” afforded by the RPA and instead directs those taxpayers/licensees to the more formal and costly remedies available through the circuit courts. As a consequence, judicial efficiency and economy is and will be adversely affected because the Circuit

Court's ruling opens the State's trial courts to lawsuits brought by taxpayers challenging state tax assessments and regulatory violations, seeking state tax refunds and other relief that was once the sole province of the Department's administrative procedures and the Administrative Law Court. At minimum, the issuance of a Writ of Certiorari here may prevent the Circuit Court in Beaufort County from an avalanche of individual suits by plaintiffs seeking to recover admissions taxes they allege have been wrongfully collected.

### QUESTIONS PRESENTED

1. Whether the State should have been dismissed as a named party?
2. Whether the scope of the RPA is limited to "disputes with the Department of Revenue concerning property taxes?"
3. Whether the Plaintiff in the instant action must exhaust administrative remedies under the RPA rather than file suit in a circuit court to challenge the collection of state admissions taxes and to seek a refund of state admissions taxes?

### ARGUMENTS

**I. THE DEPARTMENT, NOT THE STATE, IS THE ADMINISTRATIVE AGENCY CHARGED WITH THE RESPONSIBILITY OF ADMINISTERING AND ENFORCING THE TAX LAWS OF SOUTH CAROLINA SO THAT THE STATE SHOULD BE DISMISSED.**

The Department was created to administer and enforce the revenue laws of this State; administer the licensing laws and regulations relating to alcoholic liquors, beer, and wine and assess penalties for violations thereof; and other laws specifically assigned to it. S.C. Code Ann. § 12-4-10. Since the General Assembly specifically designated the Department to be responsible for those matters, the State, as an entity, is not subject to suit for matters involving taxation or the collection of revenue including, in particular, the matters alleged by the Plaintiffs. Therefore, the State should have been dismissed as a named Defendant.

**II. THE SCOPE OF THE RPA IS NOT LIMITED TO DISPUTES WITH THE DEPARTMENT OF REVENUE CONCERNING PROPERTY TAXES BUT THE RPA IS INSTEAD APPLICABLE TO ALL TAX AND REGULATORY DISPUTES WITH THE DEPARTMENT OF REVENUE EXCEPT AS SPECIFICALLY EXCLUDED BY STATUTE.**

A. Statutory Framework Of The RPA.

Section 12-60-20 sets out the purpose of the RPA:

It is the intent of the General Assembly to provide the people of this State with a straightforward procedure to determine a dispute with the Department of Revenue and a dispute concerning property taxes. The South Carolina Revenue Procedures Act must be interpreted and construed in accordance with, and in furtherance of, that intent. [<sup>3</sup>]

In keeping with that stated purpose, the RPA creates an administrative procedure to be followed when a taxpayer has a dispute with the Department concerning State taxes. For purposes of the RPA, S.C. Code Ann. § 12-60-30(27) defines “taxes” as “taxes, licenses, permits, fees, or other amounts, including interest, regulatory and other penalties, and civil fines, imposed by this title, or subject to assessment or collection by the department.” Article 5 of the RPA outlines procedures for challenging State tax assessments and jeopardy assessments and for filing claims for State tax refunds. S.C. Code Ann. § 12-60-410 through S.C. Code Ann. § 12-60- 920. Article 5 of the RPA also contains procedures to adjudicate regulatory licensing issues, to include applications for beer, wine, and liquor permits/licenses and violations of beer, wine and liquor licensing laws and regulations. S.C. Code Ann. § 12-60-1310 through S.C. Code Ann. § 12-60-1350. Article 9 of the RPA addresses the procedures to challenge property tax assessments and for filing claims for refunds of property taxes. S.C. Code Ann. § 12-60-

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<sup>3</sup>As will be explained the Respondent argues that this version of § 12-60-20 restricts applicability of the RPA.

1710 through § 12-60-1770. Article 9 further sets forth separate procedures for challenges to assessments and for filing refund claims for property appraised by the Department, S.C. Code Ann. § 12-60-2110 through § 12-60-2140 and for real and personal property valued by county auditors, S.C. Code Ann. § 12-60-2510 through § 12-60-2940.

In pertinent part, S.C. Code Ann. § 12-60-80 provides as follows:

(A) Except as provided in subsection (B), there is no remedy other than those provided in this chapter in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes.<sup>4</sup>

(Emphasis added).

Furthermore, S.C. Code Ann. § 12-60-3390 provides that “[i]f a taxpayer brings an action covered by this chapter in circuit court, the circuit court shall dismiss the case without prejudice.” (Emphasis added). In Drummond v. SC Department of Revenue, 378 S.C. 362, 662 S.E.2d 587 (2008), this Court addressed the necessity of proceeding under the RPA in a putative class action suit filed in circuit court seeking refunds of sales taxes alleged to have been wrongfully collected:

Appellant’s complaint includes causes of action for unjust enrichment and breach of constructive trust. He contends these are equitable causes of action that should not have

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<sup>4</sup>Subsection (B) of 12-60-80 contains the exception to the normal exhaustion of administrative remedies requirement under the RPA:

(B) Notwithstanding subsection (A), an action for a declaratory judgment where the sole issue is whether a statute is constitutional may be brought in circuit court. This exception does not include a claim that the statute is unconstitutional as applied to a person or a limited class or classes of persons.

The Plaintiff has not made any allegation here that any statute is facially unconstitutional.

been dismissed for failure to pursue administrative remedies under the Revenue Procedures Act. Because the relief sought in these causes of action is a disgorgement of tax monies collected, they are governed by the Revenue Procedures Act and are limited to the remedies provided therein as stated in S.C. Code Ann. § 12-60-80 (2005):

(A) Except as provided in subsection (B), there is no remedy other than those provided in this chapter in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes.

The trial court properly ruled that these causes of action are governed by the Revenue Procedures Act.

(Emphasis added). See also, Brackenbrook North Charleston, LP v. County of Charleston, 360 S.C. 390, 602 S.E.2d 39 (2004) (Civil suit for refund of property taxes collected under county ordinance previously found to be illegal dismissed because Plaintiffs failed to follow RPA procedure for claiming tax refunds.); B & A Development, Inc. v. Georgetown County, 372 S.C. 261, 641 S.E.2d 888 (S.C.2007) (RPA's exhaustion requirement applied in a property tax case between a taxpayer and a county taxing authority.)

In the instant matter, the Plaintiff seeks a refund of admissions taxes paid to Hampton Hall and subsequently remitted to the Department. The RPA provides a defined remedy for seeking State tax refunds from the State pursuant to S.C. Code Ann. § 12-60-470. Subsection (A) of § 12-60-470 requires the taxpayer to file a written claim for refund containing certain information to assist the Department in evaluating the claim. Subsection (D) of § 12-60-470 requires the division within the Department responsible for the particular tax to issue a decision to the taxpayer notifying him of the Department's action on the claim. If the taxpayer is dissatisfied with the division action, he may appeal

that decision by filing a protest which sends the case to the Office of General Counsel for Litigation for further evaluation and the issuance of a Department Determination. See, §§ 12-60-470(E) and 12-60-450. After the taxpayer exhausts its prehearing remedy as outlined, the taxpayer may appeal an adverse Department Determination to the Administrative Law Court for a hearing de novo. Section 12-60-470(F). Appeals from the Administrative Law Court go to the S.C. Court of Appeals. S.C. Code Ann. § 12-60-3380.

B. Plaintiff's Argument.

Nevertheless, the Plaintiff argued to the Circuit Court that the instant lawsuit concerning admissions taxes may go forward in circuit court because he is not required to follow the RPA inasmuch as the RPA only applies to a dispute with the Department concerning property taxes.<sup>5</sup> The Plaintiff points to the original version of § 12-60-20, which expressed that the legislative intent of the RPA was "...to provide the people of this State with a straightforward procedure to determine any disputed revenue liability" (emphasis added) and traced its historical evolution to the current form of the statute. In 2003, the General Assembly modified the language of the § 12-60-20 to state that the intent of the RPA was "...to provide a straightforward procedure to determine any dispute with the Department of Revenue." (Emphasis added). The current version, enacted in 2007, changed the language of this portion of § 12-60-20 to read that the RPA's intent was "...to provide the people of this State with a straightforward procedure to determine a dispute with the Department of Revenue and a dispute concerning

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<sup>5</sup>The Plaintiff has not alleged that he has filed a claim for refund or sought any other remedy under the RPA.

property taxes.” (Emphasis added). Relying upon Plunkett v. Adkinson, 290 S.C. 363, 350 S.E.2d 405 (S.C. Ct. App. 1986) for the proposition that the word “and” must be construed conjunctively, the Plaintiff asserts that the revised language of § 12-60-20 declaring that the RPA applies to “a dispute with the Department of Revenue and a dispute concerning property taxes” limits the reach of the RPA to disputes with the Department concerning property taxes. The Circuit Court was persuaded by this argument in its July 9, 2015 Order and its August 12, 2015 Order on Reconsideration such that the Circuit Court ordered that the RPA does not apply to Plaintiff’s claim for a refund of state admission taxes.

C. Analysis.

“The cardinal rule of statutory interpretation is to determine the intent of the legislature.” Jones v. State Farm Mutual Automobile Insurance Co., 364 S.C. 222, 612 S.E.2d 719 (2005). Furthermore, “[t]he legislature’s intent should be ascertained primarily from the plain language of the statute.” State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” Bayle v. South Carolina Dept. of Transportation, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001).

The Plaintiff’s argument must fail for a number of reasons. First, the plain meaning of § 12-60-20 itself belies such a narrow reading of the statute. While the word “and” contained within the phrase “a dispute with the Department of Revenue and a dispute concerning property taxes” should be read conjunctively, it is not to be construed so as to restrict applicability of the RPA to only disputes with the Department of Revenue concerning property taxes. Instead each word in the statute must be given its plain and

ordinary meaning. Buist v. Huggins, 367 S.C. 268, 625 S.E.2d 636 (2006) (Words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation). Furthermore, words within a statute cannot be omitted. Savannah Bank and Trust v. Shuman, 250 S.C. 344, 157 S.E.2d 864 (1962) ("It is axiomatic that words in a statute cannot be ignored or deleted.") In pertinent part, § 12-60-20 states that the RPA is applicable to "a dispute with the Department of Revenue and a dispute concerning property taxes." (Emphasis added). The more reasonable interpretation of this language is that the RPA applies to two kinds of general matters -- "a dispute with the Department of Revenue" and "a dispute concerning property taxes." The 2007 amendment to § 12-60-20 thus simply added "dispute concerning property taxes" to the ambit of the RPA.<sup>6</sup> This interpretation is consistent with the broad definition of "taxes" used in the RPA and the fact that Article 5 of the RPA contains specific procedures allowing taxpayers to challenge the Department's assessment of State taxes other than property taxes. Statutes allowing taxpayers to challenge property tax assessments on property valued by the Department are specifically provided in §§ 12-60-2110 through 12-60-2140 of the RPA. Significantly, specific provisions allowing taxpayers to challenge assessments, to include claims for refunds, on property valued by counties are set forth in §§ 12-60-2520 through

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<sup>6</sup>In pertinent part, the heading to 2007 Act 116 reads as follows: "TO AMEND SECTION 12-60-20, AS AMENDED, RELATING TO LEGISLATIVE INTENT IN CONNECTION WITH THE SOUTH CAROLINA REVENUE PROCEDURES ACT, SO AS TO INCLUDE DISPUTES CONCERNING PROPERTY TAXES..." Not only is this statement indicative of the purpose of the 2007 amendment to § 12-60-20, it must also be noted that the General Assembly affected only the "intent" section of the RPA. The substantive statutory provisions of the RPA pertaining to challenges to property tax assessments and property tax refunds predated the 2007 amendment and were not changed thereby.

12-60-2560. Section 12-60-2540 allows taxpayers to appeal decisions regarding property tax assessments to the Administrative Law Court and § 12-60-2560 allows taxpayers to appeal adverse decisions regarding property tax refunds to the Administrative Law Court with the county officers as respondents. The 2007 amendment to § 12-60-20 had no effect on any of these statutory remedies. In fact, to read § 12-60-20 as the Plaintiff urges would render §§ 12-60-410 through 12-60-1350 -- the entirety of Article 5 of RPA outlining administrative procedures for disputes involving taxes other than property taxes and administrative procedures for licensing and regulatory matters -- superfluous. Not only does the plain meaning of § 12-60-20 support the Department's position but courts have a responsibility not to interpret a statute in such a manner as to render other statutes meaningless. It is well settled that the law "does not favor the implied repeal of statutes," and "[s]tatutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative." Hodges v. Rainey, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) (citing Butler v. Unisun Ins., 323 S.C. 402, 475 S.E.2d 758 (1996)). Adoption of the Plaintiff's position would open the circuit courts to entertaining taxpayer disputes against the Department on a wide range of tax issues. This cannot be consistent with the legislative intent of the RPA.

### **III. THE PLAINTIFF IN THE INSTANT ACTION MUST EXHAUST ADMINISTRATIVE REMEDIES UNDER THE RPA.**

In his complaint, the Plaintiff alleges that admissions taxes have been wrongfully collected from him and he demands a refund of the same. The allegations the Plaintiff has made against the Department and State clearly fall within the dictate of § 12-60-80(A): "Except as provided in subsection (B), there is no remedy other than those

provided in this chapter in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes.” Furthermore, it is axiomatic that “a refund of taxes is solely a matter of governmental or legislative grace and any person seeking such relief must bring himself clearly within the terms of the statute authorizing the same.” Guaranty Bank & Trust Co. v. S.C. Tax Commission, 254 S.C. 82, 90, 173 S.E.2d 367, 370 (1970); see also, Asmer v. Livingston, 225 S.C. 341, 82 S.E.2d 465 (1954). <sup>7</sup>

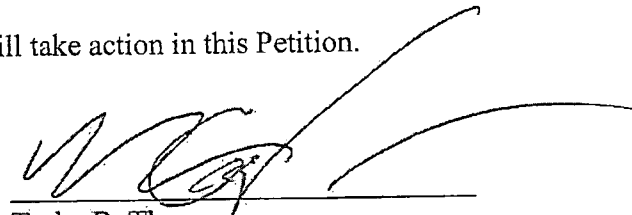
In no uncertain terms, the Plaintiff has brought a tax case against the Department and the State in circuit court. Inasmuch as the Plaintiff has failed to exhaust his administrative remedies under the RPA, this case must be dismissed against the State and the Department under the dictate of § 12-60-3390 (“[i]f a taxpayer brings an action covered by this chapter in circuit court, the circuit court shall dismiss the case without prejudice.”) The Plaintiff’s remedy is to file a claim for a refund of admissions taxes with the Department following the procedures outlined in the RPA.

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<sup>7</sup>The Circuit Court’s ruling also implicates sovereign immunity concerns. As to the Department, the statutory process of the RPA is the only means of seeking refunds of state taxes as well as addressing the other issues raised by the Plaintiff. The State, as an entity, is not subject to suit for such matters because, as discussed earlier, the Legislature has designated Department as the entity responsible for tax issues. Therefore, the State is immune from suit for any of the matters raised in this action, and Department is immune to the extent that the Plaintiff attempts to make claims outside the RPA. “The Eleventh Amendment prohibits non-consenting states from being sued in federal or state court by private individuals.” United Student Aid Funds, Inc. v. S.C. Dep’t of Health & Envtl. Control, 356 S.C. 266, 273, 588 S.E.2d 599, 603 (2003). Such immunity also extends to arms of the state, including state’s agencies and instrumentalities. See Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 101-02 (1984); Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989); Alden v. Maine, 527 U.S. at 706, 712 (1999). Because the State has not consented to suit other than as provided in the RPA as to the Department, this action is barred, by immunity.

CONCLUSION

For the foregoing reasons, the Petitioners, State of South Carolina and South Carolina Department of Revenue, respectfully request that the Court issue its Writ of Certiorari to review the Circuit Court's July 12, 2005 Order and August 12, 2015 Order on Reconsideration. These orders held that the Revenue Procedures Act applied only to disputes with the Department concerning property taxes such that the Plaintiff was not required to exhaust administrative remedies under the Revenue Procedures Act in his challenge to the collection of admissions taxes and his request for a refund of the same. The Petitioners request that the Circuit Court's orders be reversed on the issues discussed above and that the State and Department be dismissed as parties to the within action. Further, the Petitioners request that proceedings in the Circuit Court be stayed to such time that this Court determines whether it will take action in this Petition.



Tasha B. Thompson  
Counsel for Litigation  
Milton G. Kimpson  
General Counsel for Litigation  
South Carolina Department of Revenue  
Allan Wilson  
Attorney General  
Courtney E. Lowell  
Assistant Attorney General

# **EXHIBIT 2**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**RECEIVED**

SEP 28 2015

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

Perry M. Buckner, Circuit Court Judge

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Case No. 2014-CP-07-0723

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Brad Lightner, Individually, and on behalf of all  
others similarly situated ..... Respondents,

v.

Hampton Hall Club, Inc., State of South Carolina, South Carolina  
Department of Revenue, Beaufort County, and John Doe, Defendants,

Of whom, State of South Carolina and South Carolina  
Department of Revenue are ..... Petitioners.

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RETURN TO PETITION

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William F. Barnes, III  
[wbarnes@pmped.com](mailto:wbarnes@pmped.com)  
Ronnie L. Crosby  
[rcrosby@pmped.com](mailto:rcrosby@pmped.com)  
101 Mulberry Street  
Post Office Box 457  
Hampton, SC 29924  
803-943-2111

BARNES LAW FIRM, LLC  
Kathleen C. Barnes  
[kbarnes@barneslawfirmsc.com](mailto:kbarnes@barneslawfirmsc.com)  
Post Office Box 897  
Hampton, SC 29924  
803-943-4529

**ATTORNEYS FOR RESPONDENTS**

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### **COUNTER STATEMENT OF THE QUESTIONS PRESENTED**

1. Whether the Petition Meets the Requirements of Rule 245, SCACR, when a Lower Court May First Decide the Matter, the Denial of a Rule 12(b)(6), SCRCRCP, Motion is Not Immediately Appealable, and Petitioners' Arguments are Unpreserved.
2. Whether the State is a Proper Party when S.C. Code Ann. § 12-21-3010 Mandates that a Tax is a Debt Owed to the State.
3. Whether the Trial Court Correctly Interpreted the South Carolina Revenue Procedures Act ("RPA") as Applying Only to a Dispute with the Department of Revenue that Concerns Property Taxes.
4. Whether Respondents were Required to Exhaust Administrative Remedies when the RPA Does Not Apply to this Action.
5. In the event the Court grants the Petition, whether the Trial Court Erred in Dismissing the Class Action Allegations Against Petitioners.

### **COUNTER STATEMENT OF THE CASE**

This action arises out of the improper collection of admissions taxes by Petitioners, the State of South Carolina ("State") and the South Carolina Department of Revenue ("SCDOR") (collectively "Petitioners"), and Defendants Beaufort County, Hampton Hall Club, Inc., and John Doe. Respondents, Brad Lightner, Individually and on behalf of all others similarly situated, ("Respondents") are members of private club developments in Beaufort County, including Hampton Hall, who are entitled to use of club facilities by virtue of membership dues. Club dues for this type of membership to a non-profit organization are explicitly excluded from admission taxes under S.C. Code Ann. § 12-21-2420(4) (2014).<sup>1</sup> The South Carolina tax code imposes the admissions tax at issue, and its accompanying exemptions, in relevant part, as follows:

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<sup>1</sup> See *Columbia Country Club v. Livingston*, 252 S.C. 490, 496, 167 S.E.2d 300, 304 (1969) (interpreting a predecessor statute to section 12-24-2420 and holding an admission tax should not be charged on club dues paid by members of non-profit organizations).

There must be levied, assessed, collected, and paid upon paid admissions to places of amusement within this State a license tax of five percent. The license tax may be listed separately from the cost of admission on an admission ticket. However, no tax may be charged or collected:

...  
(4) . . . provided, further, that *no admission tax shall be charged or collected by reason of any charge made to any member of a nonprofit organization or corporation for the use of the facilities* of the organization or corporation of which he is a member.

S.C. Code Ann. § 12-21-2420(4) (emphasis added). (Exh. 1, Am. Cmplt. ¶¶ 21-23). Hampton Hall is a non-profit corporation that qualifies for the above-quoted exemption from admissions tax because it charges Club and Golf members an assessment for the right to use the facilities.<sup>2</sup> (Exh. 1, Am. Cmplt. ¶ 59). Despite this specific statutory exemption, Petitioners charged and collected state admissions taxes from Respondents.

On August 4, 2014, Respondents filed an Amended Complaint asserting causes of action for (1) declaratory judgment that the membership dues are not subject to State or county admission taxes, (2) quantum meruit, and (3) breach of fiduciary duty against only Hampton Hall and John Doe. (Exh. 1, Am. Cmplt.). This action was brought both in an individual capacity and on behalf of all others similarly situated. (Exh. 1, Am. Cmplt.). On August 27, 2014, Petitioners filed an Amended Motion to Dismiss Pursuant to Rule 12(b)(6), SCRPC, or in the Alternative, Motion to Strike Pursuant to Rule 12(f), SCRPC, and to Dismiss the State as a Party. On June 9, 2015, Petitioners served a Memorandum in Support of its Motion to Dismiss, arguing the South Carolina Revenue Procedures Act (“RPA”), S.C. Code Ann. §§ 12-60-10, *et seq.* (2014), applied to this action and required Respondents to exhaust administrative remedies, prohibited class action allegations, and

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<sup>2</sup> SCDOR admitted “that the charges and/or dues imposed on Club Members and Golf Members of Hampton Hall Club, Inc. entitle the member(s) to use Hampton Hall’s facilities.” (Exh. 8, Resp. to Req. to Admit No. 3).

barred injunctive relief. (Exh. 2, SCDOR Memo. in Support). All grounds for dismissal in Petitioners' Memorandum relate to the applicability of the RPA. (Ex. 2, SCDOR Memo. in Support). The Motion to Dismiss states in a footnote that it also seeks to dismiss the State as a party. (Exh. 2, p. 1 n.1).

On June 15, 2015, Respondents filed a Memorandum in Opposition to Petitioners' Motion. (Exh. 3, Memo. in Opp.). Respondents argued that the RPA does not apply to this action involving admissions taxes because, under S.C. Code Ann. § 12-60-20, the RPA applies only to actions against the Department of Revenue concerning property taxes. *See* Exh. 3, pp. 8-11; § 12-60-20 ("It is the intent of the General Assembly to provide the people of this State with a straightforward procedure to determine a *dispute with the Department of Revenue and a dispute concerning property taxes*. The South Carolina Revenue Procedures Act *must be interpreted and construed* in accordance with, and in furtherance of, that intent." (emphasis added)). Respondents also argued the State is a necessary and proper party to an action for reimbursement of wrongfully collected admissions taxes because the Legislature provided that the debt for an admission tax is owed *to the State*. Exh. 3, pp. 11-12; S.C. Code Ann. § 12-21-3010 (2014) ("The taxes and penalties imposed by this chapter shall be deemed *a debt owing to the State* by the person against whom they shall be charged." (emphasis added)). As such, any wrongfully collected taxes collected by the State would be reimbursed by the State.

The Honorable Perry M. Buckner held a hearing on Petitioners' Motion on June 16, 2015, in the Beaufort County Court of Common Pleas, and signed an Order on

Petitioners' motion on July 9, 2015. (Exh. 4, Order).<sup>3</sup> The Order denied in part and granted in part the Petitioners' motions. The Court denied the motion by holding, since "the Act [RPA] does not apply to this action", Respondents "are not required to exhaust their administrative remedies before filing an action in circuit" court. (Exh. 4, p. 3). Although holding that the RPA does not apply to this action, the Court granted the motion by holding a portion of the RPA prohibited suit from being brought as a class action. Specifically, the Court held as follows:

[F]or the [Revenue Procedures] Act to apply, the dispute must be with the appropriate body, the SCDOR, and must concern the appropriate subject matter, property taxes.

The State and SCDOR conceded at the hearing that this action does not involve property taxes. Therefore, the Act does not apply to this action. Plaintiffs are not required to exhaust their administrative remedies before filing an action in circuit [court]. . . .

[T]he Plaintiff cannot proceed against the Defendant SCDOR as a class action suit.

(Exh. 4, pp. 3-4). The Court did not address in the Order Petitioners' argument that the State should be dismissed as a party. (Exh. 4). Petitioners did not file a Rule 59(e), SCRCF, motion asking the Court to address that argument.

Following the Court's issuance of the Order, Counsel for the Petitioners emailed the trial court's law clerk on July 21, 2015, and asked for clarification as to the effect of the Order on dismissing the SCDOR or the State as a party.

There is one *matter for clarification*: The Order does not specify, but it is the Department's understanding that granting the Department's motion to

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<sup>3</sup> Petitioners failed to attached any exhibits, including the Order it asks the Court to hear in its original jurisdiction, to the Petition for Writ of Certiorari. This should be considered by the Court as a failure to meet Petitioners' burden under Rules 245 and 240, SCACR. See Rule 240, SCACR (mandating that "a party shall file affidavits and *documents in support of their positions*").

dismiss is effectively dismissing the State as well – as the Department is acting on behalf of the State. Is this a correct reading of the Order?

(Exh. 5, Resp't Mot. to Reconsider, Exh. 3) (emphasis added). The law clerk responded "That was our understanding as well." *Id.* Respondents filed a Motion to Reconsider on July 31, 2015. Respondents argued (1) the Court's finding that the RPA did not apply but applying the class action prohibition contained within the RPA is inconsistent, (2) the case the Court relied on to find the class action prohibition applied is inapplicable, and (3) the plain language of the Order did not have the effect of dismissing any defendant. (Exh. 5). Specifically as to the third argument, Respondents argued that the email between Petitioners' counsel and the Court's law clerk did not have the effect of an order and that the Court's order does not dismiss any party but, instead, allowed Respondent, Brad Lightner, to proceed against Petitioners in his individual capacity rather than as a class action since the action was brought both individually and on behalf of all others similarly situated. (Exh. 5).

On August 12, 2015, the trial court signed an Order Denying Plaintiff's Motion to Reconsider. (Exh. 6, Order). The Order expressly addressed Respondent's request to clarify that the prior Order did not dismiss a party.

Finally, to clear up any confusion from the July 9 Order, the Court finds that the Plaintiffs may proceed as an individual against all Defendants, including the SCDOR and the State of South Carolina, without the necessity of exhausting administrative remedies.

(Exh. 6, p. 3). Petitioners did not file a Rule 59(e), SCRCP, motion asking the court to reconsider.

On September 14, 2015, Respondents served a Notice of Appeal from both Orders to the Court of Appeals. (Exh. 7, Notice of Appeal). Specifically, Respondents appeal the portion of the orders dismissing the class action allegations and removing the issue

from the case as to the Petitioners. Petitioners served the Petition for Certiorari on September 16, 2015, which was received by Respondents on September 21, 2015.<sup>4</sup>

### ARGUMENT

Petitioners have not satisfied their burden under Rule 245, SCACR, and Respondents request the Court deny the Petition. Petitioners fail to address how this matter cannot be first determined by a lower court or why the public interest is involved. Petitioners also concede that the denial of a Rule 12(b)(6) motion is not appealable but argue, without citation, that the Court should hear the appeal regardless because it is “particularly appropriate” for review. (Pet. p. 4-5 n. 2). All of Petitioners’ arguments – dismissal of the SCDOR and the State, interpretation of the RPA, and exhaustion of administrative remedies – relate to the applicability of the RPA, which the Legislature limited to disputes involving the Department of Revenue concerning property taxes. Despite the RPA’s plain language, Petitioners seek to broaden the RPA’s scope so that no tax case can be brought in circuit court.

In the event the Court grants the Petition, Respondents request the Court consolidate it with Respondents’ Notice of Appeal currently pending before the Court of Appeals, pursuant to Rule 213, SCACR, regarding whether the trial court erred in dismissing the class action allegations. (Exh. 7). Respondents also oppose a stay of this action in trial court that impacts the continuance of litigation against Beaufort County, Hampton Hall, and John Doe, who are not parties to this Petition. *See* Rule 205, SCACR

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<sup>4</sup> To the extent the Petition constitutes an appeal that must be filed with the clerk of the lower court under Rule 203(d)(1)(A), SCACR, Petitioners failed to comply with that requirement. As Respondents received a copy of only the Petition with no cover letter, and the certificate of service does not include the Beaufort County Clerk of Court, it appears Petitioners did not also file with the Beaufort County Clerk of Court as required by Rule 203(d)(1)(A).

(“Nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal.”); Rule 241(a), SCACR (“The lower court . . . retains jurisdiction over matters not affected by the appeal.”).

**I. THERE IS NO BASIS FOR THE COURT TO EXERCISE ITS ORIGINAL JURISDICTION**

The Petition fails to meet the requirements of Rule 245, SCACR, because (1) the matter can be first determined by a lower court and (2) there is no public interest involved. As discussed below, it is established law in South Carolina that an order denying a Rule 12(b)(6), SCRCR, motion to dismiss is not immediately appealable. *Burkley v. Noce*, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012). Petitioners concede that the denial of a 12(b)(6) motion is not immediately appealable but argue the trial court’s ruling on the RPA is “particularly appropriate” for appellate review. (Pet. p. 4-5, n. 2). Petitioners attempt to avoid this established law by invoking this Court’s original jurisdiction under Rule 245. This is an improper use of Rule 245, and the Court should deny the Petition for the reasons set forth below.

**A. *The Matter Can be Determined in a Lower Court***

“The Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties.” Rule 245(a), SCACR; Jean H. Toal, Appellate Practice in South Carolina 265 (1999).

Seeking a writ of certiorari from the Supreme Court when the matter is one regularly determined in a lower court in the first instance is legally and procedurally improper.

Although Article V, § 5, of the South Carolina Constitution vests this Court with the authority to issue extraordinary writs and entertain

actions in its original jurisdiction, this Court's primary function is to act as an appellate court to review appeals from the trial courts. In Rule 229, SCACR,<sup>5</sup> this Court has indicated it will not entertain matters in its original jurisdiction where the matter can be entertained in the trial courts of this State.

*Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991). Petitioners fail to address in the Petition why the matter cannot first be heard to completion in the trial court or in the Court of Appeals. There is no material prejudice to the rights of Petitioners because they will receive a review of the issues, should they so choose to do so in a procedurally proper manner.

***B. There is no Public Interest Involved***

Even if the Court found that the matter could not first be determined in a lower court, it should still deny the Petition because there is no public interest involved. "Only when there is an extraordinary reason such as a question of significant public interest or an emergency will this Court exercise its original jurisdiction." *Key*, 305 S.C. at 116, 406 S.E.2d at 357. Respondents' case involving admissions taxes does not present such an extraordinary reason that warrants granting the Petition. Under Rule 245, "[i]f the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised, the facts showing the reasons must be stated in the petition." Petitioners argue the Court should grant the Petition because (1) the interpretation of the RPA "is novel" and (2) a "Writ of Certiorari here may prevent the Circuit Court in Beaufort County from an avalanche of individual suits by plaintiffs seeking to recover admissions taxes." (Pet. pp. 6-7). Neither is an "extraordinary" reason that involves public interest.

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<sup>5</sup> Rule 229, SCACR, is the predecessor to Rule 245, SCACR.

The interpretation of the “RPA” is not novel because it is consistent with a 2007 ruling of the United States District Court for the District of South Carolina. *See City of Charleston v. Hotels.com, LP*, 520 F. Supp. 2d 757, 769 n.9 (D.S.C. 2007) (stating that the Court’s holding that plaintiffs are not required to exhaust administrative remedies under the RPA as to an accommodations tax issue is “further strengthened by a very recent amendment to” § 12-60-20). Further, not every allegedly novel issue warrants an extraordinary writ of certiorari. Second, it is contradictory for Petitioners to argue below that Respondents’ class action allegations should be dismissed but now seek certiorari based on an alleged flood of individual cases regarding the improper collection of admissions taxes. There is no proof, by affidavit or otherwise, that any such “avalanche” is forthcoming. *See* Rule 245(a) (“[T]he facts showing the reasons [the Court should grant the petition] must be state in the petition *with supporting affidavits*.” (emphasis added)).

This case is easily distinguishable from those cited by Petitioners because it does not involve numerous claims in state and federal courts, and does not involve a larger issue that should be addressed to trial courts generally. *See Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep’t of Health & Env’tl. Cntrl.*, 387 S.C. 380, 692 S.E.2d 920 (2010) (granting petition to review discovery order “to speak to trial courts generally” and address “concern that ‘discovery practice’ has become a cottage industry”); *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009) (granting petition in product liability case as to the discoverability of trade secrets involving “a novel question . . . that has been the subject of numerous claims in state and federal courts”); *In re Breast Implant Prod. Liab.*, 331 S.C. 540, 543 n.2, 503 S.E.2d 445, 446-47

n.3 (1998) (granting petition in case involving “novel questions of law” in “numerous state and federal actions” that the Court could not address via a motion to certify questions from the circuit court).

As Petitioners have not put forth extraordinary reasons for an emergency intervention, the Petition should be denied.

## **II. AN ORDER DENYING A RULE 12(b)(6) MOTION TO DISMISS IS NOT APPEALABLE**

Petitioners ask this Court to review, on an extraordinary writ, the denial of a Rule 12(b)(6), SCRCF, motion to dismiss based on arguments that Respondents should have exhausted administrative remedies and the State should not be a party to this action. (Pet. pp. 2-3). As Petitioners concede, the “denial of such a [Rule 12(b)(6)] motion is not immediately appealable.” *McLendon v. S.C. Dep’t of Highways & Pub. Transp.*, 313 S.C. 525, 526, 443 S.E.2d 539, 540 (1994); Pet. pp. 4-5 n.2. The issues raised in the Petition are not final rulings that involve the merits or affect a substantial right under S.C. Code Ann. § 14-3-330. Petitioners seek to improperly use Rule 245 to avoid the required procedure of continuing with litigation and obtaining a final ruling before filing an appeal. “Avoidance of trial is not a ‘substantial right’ entitling a party to immediate appeal of an interlocutory order.” *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991).

Appellate Courts generally dismiss appeals from the denial of a Rule 12(b)(6) motion because “the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings.” *Id.* at 526 n.2, 443 S.E.2d at 540 n.2. Petitioners chose to pursue this Petition as its sole means of relief for interlocutory, unappealable issues. Respondents request the Court

deny the Petition seeking an extraordinary writ as to issues that are unappealable and may be first addressed by a lower court.

### III. PETITIONERS' ARGUMENTS ARE NOT PRESERVED

Petitioners failed to file a Rule 59(e), SCRCP, motion as to any issue. As noted above, the Court did not rule on Petitioners' argument that the State (not the SCDOR) should be dismissed as a party because the SCDOR is the agency responsible for enforcing tax laws. (Exh. 4). "A party *must* file such a motion when an issue or argument has been raised, *but not ruled on*, in order to preserve it for appellate review." *Elam v. S.C. DOT*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). The failure to file a Rule 59(e) motion as to this issue renders it unpreserved for appellate review. Petitioners' email to the Court's law clerk asking for "clarification" of the July 9 Order is not the proper procedural manner to ask a Court to clarify an Order. Contrary to Petitioner's argument, the law clerk's response email did not have the effect of an Order. *See Corbin v. Kohler Co.*, 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct. App. 2002) ("No order is final until it is written *and entered*." (emphasis added)).

Petitioners' main complaint is that the trial court interpreted the RPA as applying to only a dispute with the Department of Revenue that concerns property taxes. This is evident by the fact that the great majority of Petitioners' argument discusses this issue and by the following sentence in the Petition :

It is from the Circuit Court's ruling – first announced in the July 9, 2015 Order and restated in the subsequent Order on Reconsideration – that the Plaintiff(s) need not exhaust administrative remedies under the RPA in the context of a challenge to the legitimacy of a state tax collection and the companion prayer for a state tax refund that the State and the Department seek this Court's review by way of Writ of Certiorari.

(Pet. p. 4). Petitioners also did not file a Rule 59(e) motion as to this issue and, therefore, it is unpreserved. When Petitioners erroneously interpreted the trial court's order as dismissing them from the action, they did not bother to seek reconsideration of this issue. However, the trial court's ruling as to the applicability of the RPA, and its effect on filing individual tax disputes in circuit court, is plainly stated in the July 9 Order. Petitioners chose not to seek reconsideration of that issue and should not be permitted to do so by way of a Rule 245 petition.

The Court may deny the Petition solely because the issues raised are not preserved.

#### **IV. THE STATE IS A PROPER PARTY AS ADMISSIONS TAXES ARE OWED TO THE "STATE"**

Petitioners first argue that the State should be dismissed but, in a conclusory, one-paragraph argument, cite no legal authority supporting this position. (Pet. p. 7). Petitioners' argument should be deemed abandoned. *See Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 573, 772 S.E.2d 882, 892 (Ct. App. 2015) ("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory." (internal quotation marks omitted)); Rule 208(b)(1)(d), SCACR ("[T]he particular issue to be addressed *shall* be . . . followed by discussion and *citations of authority.*" (emphasis added)); Rule 240, SCACR ("Each petition *shall* include the following: . . . A memorandum with citation of authorities." (emphasis added)).

Even if the Court addresses the merits of Petitioners argument, the State is a proper party. Petitioners' sole argument for dismissal of the State is that the SCDOR is "created to administer and enforce the revenue laws of this State." S.C. Code Ann. § 12-4-10. Section 12-4-10 does not state that the SCDOR is the sole entity to be named in an

action for reimbursement of wrongfully collected admission taxes. Besides this general reference to the creation of the SCDOR, Petitioners do not cite any basis to support the argument that the State should be dismissed as a party. As Respondents argued below, a more specific statute mandates that all state admissions taxes are owed to the State. *See* S.C. Code Ann. § 12-21-3010 (2014) (“The taxes and penalties imposed by this chapter shall be deemed *a debt owing to the State* by the person against whom they shall be charged.” (emphasis added)). In the Petition, the State and SCDOR do not address how the State is not a proper party in light of the plain language of § 12-21-3010. Petitioners did not address this statute before the Circuit Court and should not be permitted to do so here. As Respondents assert a cause of action for quantum meruit, any amount wrongfully collected by the State would be the responsibility of the State if it is found liable following a trial in this matter.

Petitioners read language into the trial court’s July 9, 2015 Order regarding the alleged dismissal of the State and SCDOR that is not there. This action was plainly brought both in an individual capacity and on behalf of all others similarly situated. (Exh. 1, Am. Cmplt.). In the July 9 Order, the trial court made two rulings: (1) the RPA “does not apply to this action. Plaintiffs are not required to exhaust administrative remedies before filing an action in circuit court”; and (2) “Plaintiff cannot proceed against the Defendant SCDOR as a class action suit.” (Exh. 4, pp. 3-4). Respondents filed a Motion to Reconsider on July 31, 2015, and, among other things, sought to clarify whether SCDOR and the State were dismissed entirely when the plain language of the Order did not have the effect of dismissing both Petitioners but, instead, dismissed the class action allegations against Petitioners. (Exh. 5). The clarification was prompted only by

Petitioners' email correspondence with the Court's law clerk. Specifically, Respondents argued that the email between Petitioners' counsel and the Court's law clerk did not have the effect of an order and that the trial court's order does not dismiss any party but, instead, allowed Plaintiff Brad Lightner to proceed against Petitioners in his individual capacity rather than as a class action. (Exh. 5). The trial court's Order on the Motion to Reconsider stated "to *clear up any confusion* . . . the Court finds that the Plaintiffs may proceed as an individual against all Defendants, including the SCDOR and the State of South Carolina, without the necessity of exhausting administrative remedies." (Exh. 6) (emphasis added). This is not a new ruling, but a clarification necessitated by Petitioners' improper email request. For this reason, Petitioners' characterization of the August 12 Order as "essentially reinstating the State and Department as parties" is incorrect and should be disregarded, (Pet. p. 4). The State is a proper party to this action, and the trial court did not dismiss any Defendant.

**V. THE PLAIN LANGUAGE OF THE LEGISLATIVE INTENT LIMITS THE RPA TO DISPUTES INVOLVING THE DEPARTMENT OF REVENUE CONCERNING PROPERTY TAXES**

Petitioners next argue that, despite the plain language of the RPA's legislative intent, the RPA is not limited to disputes with the Department of Revenue concerning property taxes. As the trial court correctly held, and the RPA's legislative intent makes clear, the RPA applies only to disputes involving the Department of Revenue concerning property taxes. The trial court's holding is supported by the Legislature's amendments to the RPA's legislative intent in § 12-60-20.

The original version of § 12-60-20 stated:

It is the intent of the General Assembly to provide the people of this State with a straightforward procedure to determine *any disputed revenue*

*liability*. The South Carolina Revenue Procedures Act must be interpreted and construed in accordance with, and in furtherance of, that intent.

1995 Act. No. A60, § 4A (emphasis added); (Exh. 3, Memo. in Opp., Exh. 2). In 2003, the Legislature amended § 12-60-20 by narrowing the application of the RPA from “any disputed revenue liability” to “a straightforward procedure to determine *any dispute with the Department of Revenue*.” 2003 Act No. 69, § 3.CC (emphasis added) (Exh. 3, Memo in Opp., Exh. 3). In 2007, the Legislature again narrowed the legislative intent to its current form, which reads:

It is the intent of the General Assembly to provide the people of this State with a straightforward procedure to determine a *dispute with the Department of Revenue and dispute concerning property taxes*. The South Carolina Revenue Procedures Act must be interpreted and construed in accordance with, and in furtherance of, that intent.

§12-60-20 (emphasis added). As the Legislature sets forth in the 2007 amendment, the RPA *must* be interpreted and construed in accordance with the legislative intent.

The General Assembly’s use of the conjunctive “and” in the 2007 amendment to § 12-60-20 establishes that the Act applies to (1) a dispute with the Department of Revenue (2) that concerns property taxes. “‘The word ‘and’ is to be construed literally . . . .” *Plunkett v. Adkinson*, 290 S.C. 363, 366, 350 S.E.2d 405, 407 (Ct. App. 1986) (holding the language “and me” in a will “is clearly conjunctive rather than disjunctive”) (quoting *Lee v. Citizens & Southern Nat’l Bank of S.C.*, 253 S.C. 556, 561, 172 S.E.2d 114, 116 (1970)).<sup>6</sup>

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<sup>6</sup> See also *Terry v. Lee*, 314 S.C. 420, 425, 445 S.E.2d 435, 437 (1994) (holding the use of “the conjunctive term ‘and’” in a statute required compliance with both stated requirements); *Charleston Cnty. Aviation Auth. v. Wasson*, 277 S.C. 480, 483, 489, 289 S.E.2d 416, 418, 421 (1982) (finding the General Assembly’s use of “the conjunctive word ‘and’” in the language “duty of the Tax Commission *and* county assessor to determine” indicates “both the Tax Commission and assessor are to make the determination”); *Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 345, 428 S.E.2d 889, 891 (Ct. App. 1993) (stating the General Assembly’s prior use of the term “and” rather

“The Legislature is presumed to be aware of this Court’s interpretation of its statutes.”  
*Wigfall v. Tideland Utils.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003).

Petitioners concede “and” “should be read conjunctively” but argue that means “in addition to” rather than necessitating satisfaction of both stated requirements. (Pet. p. 12). Instead of construing the statute in accordance with established South Carolina law, Petitioners put forth their own explanation of what the Legislature attempted to accomplish with the 2007 amendment: “The more reasonable interpretation of this language is that the RPA applies to two kinds of general matters – ‘a dispute with the Department of Revenue’ and ‘a dispute concerning property taxes.’” (Pet. p. 13). Such a reading contorts the Legislature’s plain language and changes the word “and” to “or.” If the Legislature intended §12-60-20 to be disjunctive rather than conjunctive it would have used “or.” While Petitioners desire to read language into §12-60-20 to support their position and expand the breadth of the RPA, they are bound by the statute’s plain language. *Bayle v. S.C. Dept. of Transp.*, 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001 (“What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.”)).

In a footnote, Petitioners argue the heading of 2007 Act No. 116, which contained the Legislature’s last amendment to the RPA’s legislative intent, support their position that § 12-60-20 is disjunctive rather than conjunctive. (Petition p. 13, n. 6). This argument was not made to the trial court and is, therefore, not preserved for appellate review. *Holy Loch Distribs. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000) (“In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court.”). Even if the argument is preserved, it does not impact the plain language the

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than “or” in a list of conditions made the conditions “conjunctive rather than alternative, so a claimant had to meet all of them or his claim failed”).

Legislature set forth in § 12-60-20 as the heading of the Act (which is not part of the statute) is not a tool for statutory interpretation. Petitioners cited no authority for the use of an Act in interpreting an unambiguous statute. *See, e.g., Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (“[T]itle and headings . . . of the statute . . . *may not be construed to limit* the plain meaning of the text. For interpretative purposes, the title of a statute and heading of a section are of use *only* when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, but they *cannot undo or limit what the text makes plain.*” (emphasis added)). Construing § 12-60-20 as Petitioners suggest would render the 2007 amendment meaningless. If the RPA is intended to apply to all tax disputes, as Petitioners argue, then it would be futile and pointless to add the words “and a dispute concerning property taxes.” “[T]here is a presumption that the legislature intended to accomplish something with a statute rather than to engage in a futile exercise.” *Berkebile v. Outen*, 311 S.C. 50, 53-54, 426 S.E.2d 760, 762 (1993). The trial court, in its July 9, 2015 Order, correctly held that “for the Act to apply, the dispute must be with the appropriate body, the SCDOR, and must concern the appropriate subject matter, property taxes.” (Exh. 4 p. 3). Any reading to the contrary would be against the Legislature’s express intent.

Petitioners also rely on *Drummond v. State*, 378 S.C. 362, 662 S.E.2d 587 (2008), for the proposition that Respondents cannot assert class action allegations and administrative remedies must be exhausted. *Drummond* does not apply to the current version of the RPA at issue in this case. The Complaint in *Drummond* was filed in 2002. In 2002, the legislative intent of the RPA, in § 12-60-20, read “It is the intent of the General Assembly to provide the people of this State with a straightforward procedure to determine any disputed revenue

liability.” 1995 Act. No. A60, § 4A (Exh. 3, Memo. in Opp., Exh. 2). “In South Carolina, the law in effect at the time the cause of action accrued controls the parties’ legal relationships and rights.” *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 397, 596 S.E.2d 42, 46-47 (2004). The 1995 version of the Act applied in *Drummond* and, therefore, the Court did not consider in that case the implication of the 2007 amendment.

The current version of the intent of the Act applies in this case. The trial court correctly held that, under the current version of § 12-60-20, “for the Act to apply, the dispute must be with the appropriate body, the SCDOR, and must concern the appropriate subject matter, property taxes.” (Exh. 4, Order p. 3). Therefore, even though this Court issued its opinion in *Drummond* in 2008, the holding of the applicability of the class action prohibition within the RPA in that case does not apply to the current legislative intent of the RPA.

Drummond filed a class action for the denial of a statutory *sales tax* exemption for diabetic supplies. 378 S.C. at 365, 662 S.E.2d at 588. He argued the SCDOR “improperly promulgated regulations” that did not conform to the exemption statute and sought monetary damages. *Id.* On appeal from an order in favor of the defendants, this Court addressed two issues relevant to this case. First, the Court found the RPA applied to Drummond’s causes of action for unjust enrichment and breach of constructive trust and, therefore, he was required to exhaust his administrative remedies. *Id.* at 368-69, 662 S.E.2d at 590. Second, the Court found the RPA could not apply to Drummond’s cause of action for a declaratory judgment that the SCDOR exceeded its authority in promulgating a regulation. *Id.* at 369-70, 662 S.E.2d at 590-91. The reason the RPA could not apply to the declaratory judgment cause of action is that the administrative law court, which would hear the issue under the RPA, does not have the authority to rule on the validity of a regulation. *Id.* at 370, 662

S.E.2d at 591. Therefore, Drummond could “pursue this issue . . . in circuit court” because no administrative remedy existed. *Id.* This is different from finding the Act does not apply. In *Drummond*, the RPA could not apply because the administrative law court, as part of the executive branch, could not legally provide a remedy. After holding the declaratory judgment action must be transferred to the circuit court, the Court, in a footnote, “note[d]” that the Act’s prohibition on class actions in § 12-60-80(C) would prevent the case from proceeding as a class action in circuit court. *Id.* at 370 n.5, 662 S.E.2d at 591 n.5. *Drummond* is distinguishable from this case.<sup>7</sup> As the Legislature was clear in its 2007 Amendment to the legislative intent, the RPA only applies to disputes involving the Department of Revenue concerning property taxes.

#### **VI. PLAINTIFF IS NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES**

Finally, Petitioners argue that Respondent must exhaust administrative remedies pursuant to the RPA. Petitioners do not, however, set forth the basis why this issue necessitates an extraordinary writ or why this cannot be first determined in a lower court. As such, Petitioners have not satisfied their burden of establishing original jurisdiction.

Petitioners cite S.C. Code Ann. § 12-60-3390 in support of this position, which provides that “[i]f a taxpayer brings *an action covered by this chapter* in circuit court, the circuit court shall dismiss the case without prejudice.” (Pet. p. 15) (emphasis added). The trial court correctly held Chapter 60 does not apply to this action. Therefore,

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<sup>7</sup> *Brackenbrook North Charleston, LP v. County of Charleston*, 360 S.C. 390, 602 S.E.2d 39 (2004) and *B&A Development, Inc. v. Georgetown County*, 372 S.C. 261, 641 S.E.2d 888 (2007) are both distinguishable because they involve property taxes and the causes of action arose prior to the Legislature’s 2007 amendment to the RPA.

Respondents are not required to exhaust their administrative remedies. Respondents' action complies with South Carolina statutory law and should proceed as pled.

Petitioners also argue that the trial court's ruling implicates sovereign immunity concerns. (Pet. p. 15, n. 7). This argument is unpreserved as it was neither made to nor ruled upon by the trial court and cannot be raised for the first time on appeal. *Holy Loch Distribs.*, 340 S.C. at 24, 531 S.E.2d at 284 ("In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court."). Even if this issue is preserved, which Respondents do not concede, Respondents' causes of action for declaratory judgment and quantum meruit against Petitioners do not raise sovereign immunity concerns. The exhaustion of administrative remedies is unrelated to sovereign immunity. Immunity speaks to the fact that an entity cannot be liable for a particular action, whereas exhaustion of administrative remedies speaks to the procedural manner used to prove liability. Additionally, sovereign immunity is an affirmative defense that must be pled and proven. *See Rayfield v. S.C. Dept. of Corrections*, 297 S.C. 95, 105, 374 S.E.2d 910 (Ct. App. 1988). As the Petition is before the Court on the denial of Petitioners' 12(b)(6) motion, the unpreserved argument is not final. *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 402 S.E.2d 482 (1991). The Court should decline to address this unpreserved issue.

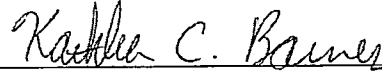
### CONCLUSION

The Petition does not warrant this Court's exercise of its original jurisdiction under Rule 245, SCACR, because the matter may first be decided by a lower court and there is no public interest involved. Further, the issues are not appealable and

unpreserved for review. Respondents request this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

BARNES LAW FIRM, LLC



Kathleen C. Barnes

[kbarnes@barneslawfirmllc.com](mailto:kbarnes@barneslawfirmllc.com)

Post Office Box 897

Hampton, SC 29924

803-943-4529

-AND-

PETERS, MURDAUGH, PARKER,  
ELTZROTH & DETRICK, P.A.

William F. Barnes, III

[wbarnes@pmped.com](mailto:wbarnes@pmped.com)

Ronnie L. Crosby

[rcrosby@pmped.com](mailto:rcrosby@pmped.com)

101 Mulberry Street

Post Office Box 457

Hampton, SC 29924

803-943-2111

**ATTORNEYS FOR RESPONDENTS**

# **EXHIBIT 3**

# The Supreme Court of South Carolina

Brad Lightner, individually, and on behalf of all others  
similarly situated, Respondent,

v.

Hampton Hall Club, Inc., State of South Carolina, South  
Carolina Department of Revenue, Beaufort County and  
John Doe, Defendants,

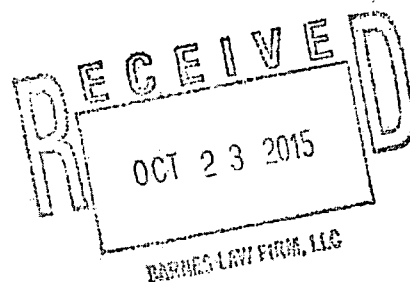
of whom State of South Carolina and South Carolina  
Department of Revenue are Petitioners.

Appellate Case No. 2015-001952

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ORDER

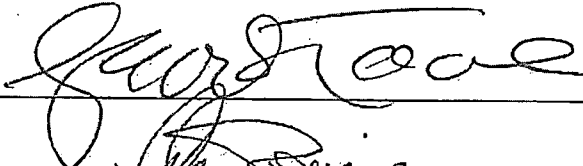

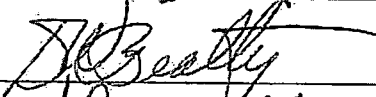

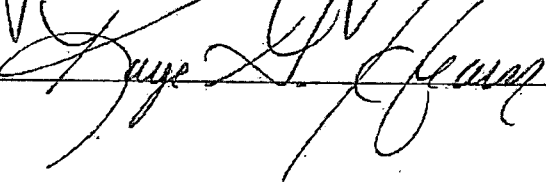
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Petitioners have filed a petition for a writ of certiorari in this Court's original jurisdiction. Respondent has filed a return in opposition to the petition. Petitioners have filed a reply to the return to the petition for a writ of certiorari. The petition for a writ of certiorari is granted.

Within thirty days of the date of this order, petitioners shall serve and file their initial brief and designation of matter to be included in the record in accordance with Rules 208 and 209, SCACR. Respondent shall have thirty days after service of petitioners' brief to serve and file his initial brief and designation of matter to be included in the record. Thereafter, petitioners shall have ten days to serve and file their initial reply brief and designate any additional matter to be included in the record.

Within thirty days after service of the initial reply brief, petitioners shall serve and file the record on appeal in accordance with Rule 210, SCACR. Thereafter, final briefs shall be served and filed as set forth in Rule 211, SCACR. The parties will be notified if oral argument is to be held.

  
C.J.  
  
J.  
  
J.  
  
J.  
  
J.

Columbia, South Carolina

October 21, 2015

cc:

Alan McCrory Wilson, Esquire  
Courtney Edwards Lowell, Esquire  
Tasha B. Thompson, Esquire  
Milton Gary Kimpson, Esquire  
William Franklin Barnes, III, Esquire  
Kathleen Chewning Barnes, Esquire  
Ronnie Lanier Crosby, Esquire  
Terry A. Finger, Esquire  
Eugene Richardson LaBruce, Esquire  
Mary Bass Lohr, Esquire

# BARNES

LAW FIRM | LLC

Kathleen C. Barnes  
Admitted: Georgia | South Carolina

February 2, 2016

RECEIVED

FEB 05 2016

SC Court of Appeals

Via U.S. Mail

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

Re: *Brad Lightner, Individually, and on behalf of all others similarly situated v. Hampton Hall Club, et al.*  
Appellate Case No. 2015-001969  
Civil Action No. 2014-CP-07-723

Dear Ms. Kitchings:

Counsel for Appellant Brad Lightner, individually, and on behalf of all others similarly situated, ("Lightner") is in receipt of the Court's January 26, 2016, letter stating it will not take any action on Lightner's motion to withdraw and vacate its December 24, 2015 Order on the basis that the Court is without jurisdiction. Lightner requests the Court reconsider this position and vacate the December 24, 2015 Order because, at the time the Court issued the Order, it was without jurisdiction.

The appellate procedure that occurred in this case is irregular. Lightner filed a Notice of Appeal with this Court on September 16, 2015. The appeal sought review of the trial court's order granting Respondents, State of South Carolina and South Carolina Department of Revenue's, motion to dismiss Lightner's class action allegations based on a provision of the Revenue Procedures Act. Subsequently, on September 21, 2015, the State and SCDOR filed a Petition for Writ of Certiorari in the South Carolina Supreme Court for the same trial court orders Lightner appealed to this Court. (Exh. 1). On October 1, 2015, Lightner notified this Court by letter about the State and SCDOR's Petition pending in the Supreme Court. Lightner, in his Return to Petition, specified "In the event the Court grants the Petition, [Lightner] request[s] the Court consolidate it with [Lightner's] Notice of Appeal pending before the Court of Appeals, pursuant to Rule 213, SCACR, regarding whether the trial court erred in dismissing the class action allegations." (Exh. 2, p. 6).

The Supreme Court granted the State and SCDOR's Petition on October 26, 2015. (Exh. 3). The order granting the petition stated only "The petition for writ of certiorari is granted." *Id.*; see Rule 242, SCACR ("If the petition is granted, the Clerk shall notify each party or his attorney, specifying the question or questions to be considered . . ."). The Supreme Court recently issued Order 2016-01-20-01, which provides that the order granting the petition "shall indicate the questions that will be considered." Although the Order in this case does not specify the questions

the Supreme Court is to consider, the issues raised by both parties concern the applicability and interpretation of the Revenue Procedures Act and arise from the same orders.

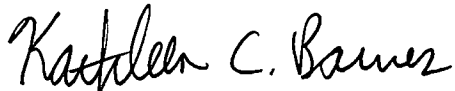
When this Court issued its December 24, 2015 Order,<sup>1</sup> the Supreme Court had jurisdiction over this case, and Lightner asserts this Court was without jurisdiction. *See* S.C. Code Ann. § 14-3-310 (1976) (discussing the Supreme Court's "power to issue writs" and titled "Original *jurisdiction* of Supreme Court" (emphasis added)); *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) (noting "Article V, § 5, of the South Carolina Constitution vests this Court with the authority to issue extraordinary writs and entertain actions in its original *jurisdiction*" (emphasis added)). Further, there was no need for the Court to send a remittitur to the lower court, as the Orders that Appellant appealed to this court are currently on appeal in the Supreme Court. *See, e.g.*, Rule 221(b), SCACR ("If a petition for writ of certiorari is filed, the Court of Appeals shall not send the remittitur until notified that the petition has been denied. If the writ is granted by the Supreme Court, the Court of Appeals shall not send the remittitur.").

Appellant requests this Court vacate the December 24, 2015 Order because it was without jurisdiction over the case due to the Supreme Court's order granting certiorari on October 26, 2015.

By copy of this letter, I am serving all counsel of record with a copy of the same. If you have any questions, please do not hesitate to contact me. Thank you.

With kind regards, I am,

BARNES LAW FIRM, LLC



Kathleen C. Barnes

Enclosures

cc: William F. Barnes, III (via email)  
Milton Gary Kimpson  
Tasha B. Thompson

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<sup>1</sup> The Court issued its order dismissing the appeal as unappealable without allowing the parties to address the issue of appealability. Appellant asserts the class action issue is appealable because the effect of the lower court's order on Respondent's motion to dismiss was to remove the class action issue from the case, rather than to address the merits of class certification under Rule 23, SCRC. *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304-05, 705 S.E.2d 475, 479 (Ct. App. 2011). Further, an order granting a motion to dismiss is immediately appealable. *Lebovitz v. Mudd*, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (Ct. App. 1986).

Alan Wilson  
Courtney E. Lowell  
The Honorable Jerri Ann Roseneau  
Terry A. Finger  
E. Richardson LaBruce  
Mary Bass Lohr

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The Honorable Jenny Abbott Kitchings  
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FEB 05 2016

SC Court of Appeals

**HANDLE WITH CARE**

