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SC SUPREME COURT

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Order (S.C. Ct. App. filed April 13, 2016)
Court of Appeals Appellate Case No. 2015-001969

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

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 Respondents.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL 1

QUESTIONS PRESENTED..... 1

STATEMENT OF THE CASE..... 2

ARGUMENT 5

 I. THE COURT OF APPEALS ERRED IN DISMISSING PETITIONER’S APPEAL AS UNAPPEALABLE BECAUSE, ONCE THE SUPREME COURT GRANTED A PETITION FOR CERTIORARI IN AN APPEAL FROM THE SAME ORDERS, THE COURT OF APPEALS NO LONGER MAINTAINED JURISDICTION OVER THE CASE..... 5

 II. THE CLASS ACTION ISSUE IS APPEALABLE BECAUSE IT REMOVED THE ISSUE FROM THE CASE RATHER THAN DENYING CLASS CERTIFICATION ON THE MERITS. 6

 III. THE LOWER COURT ERRED IN DISMISSING THE CLASS ACTION ALLEGATIONS AGAINST PETITIONER. 8

CONCLUSION..... 8

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 13, 2016. (App. pp. 16-17, 74-75).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in dismissing Petitioner’s appeal as unappealable when it did not have jurisdiction over the case.
2. Whether the Court of Appeals erred in dismissing Petitioner’s appeal as unappealable when the lower court’s Order effectively removed the class action issue from the case rather than ruling on the merits of class certification.
3. Whether the lower court erred in dismissing the class action allegations against Petitioner.

STATEMENT OF THE CASE

This case arises from an action alleging the improper collection of State and county admissions taxes by Respondents, the State of South Carolina and the South Carolina Department of Revenue (“SCDOR”) (collectively “Respondents”), and Defendants Beaufort County, Hampton Hall Club, Inc., and John Doe. Petitioner Brad Lightner is a member of Hampton Hall Club who paid the admissions tax at issue when Hampton Hall Club is exempt from payment of such taxes on member dues. Others similarly situated are members of similar non-profit clubs in Beaufort County that are also exempt from payment of admissions taxes. Petitioner filed this action in circuit court seeking a declaratory judgment that the club memberships are not subject to State or County admissions taxes and return of the wrongfully collected taxes. (App. pp. 47-48). Respondents filed a motion to dismiss the case, arguing the South Carolina Revenue Procedures Act (“RPA”), S.C. Code Ann. §§ 12-60-10, *et seq.*, required Petitioner to exhaust administrative remedies and barred him from naming Respondents as defendants in a class action. The lower court issued an Order holding Petitioner is not required to exhaust administrative remedies but cannot proceed against Respondents as a class action. (App. pp. 82-85).

This is an appeal from the same orders pending on appeal in this Court in *Brad Lightner, individually, and on behalf of all others similarly situated v. State of South Carolina and South Carolina Department of Revenue*, Appellate Case No. 2015-001952. Some procedural history is necessary to explain the reasoning for the continuation of this case in the Court of Appeals and Petitioner’s action in filing this Petition. In short, the parties dispute what issues are before this Court in Appellate Case No. 2015-001952, and Petitioner files this Petition to ensure that it preserves the ability to have the issues it raised to the Court of Appeals heard.

On September 14, 2015, Petitioner served a Notice of Appeal from the orders at issue in the Court of Appeals. (App. pp. 78-81). On September 16, 2015, Respondents served a Petition for Writ of Certiorari in this Court. (App. p. 21). In its Return to the Petition, filed September 28, 2015, Petitioner specifically requested in its Counter Statement of the Questions Presented that, “In the event the Court grants the Petition,” this Court address “whether the Trial Court Erred in Dismissing the Class Action Allegations Against Petitioners.” (App. p. 47). Similarly, Petitioner requested “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.” (App. p. 52).

On October 7, 2015, Petitioner filed a motion in the Court of Appeals to hold that appeal in abeyance pending this Court’s decision on Respondents’ petition. (App. p. 3). On October 21, 2015, this Court granted the petition but did not specify what questions the Court would address, stating “The petition for a writ of certiorari is granted.” (App. pp. 8-9). On October 26, 2015, the Court of Appeals issued a letter stating all timelines “are held in abeyance pending a ruling on appellant’s motion to hold this case in abeyance.” (App. p. 5).

On December 22, 2015, without notice to the parties, and while the order holding timelines in abeyance was still in effect, the Court of Appeals issued an order dismissing the appeal as unappealable. (App. pp. 1-2). The Court of Appeals interpreted the portion of the lower court’s order dismissing Petitioner’s class action allegations against Respondents as an order denying class certification. *Id.* On January 7, 2016, Petitioner filed a Motion to Withdraw Appeal and Vacate Order in the Court of Appeals. (App. pp. 6-7). Petitioner asserted that, at the time the Court of Appeals dismissed the case as unappealable, it had no jurisdiction over the case because this Court

previously granted Respondents' petition as to the same orders. *Id.* On the same day the Court of Appeals received Petitioner's Motion, it issued a remittitur of the case to the circuit court. (App. p. 12). A few weeks later, on January 26, 2016, the Court of Appeals sent a letter to the parties stating it would take no action on Petitioner's Motion to Withdraw and Vacate. (App. p. 15). On February 5, 2016, Petitioner asked the Court of Appeals to reconsider its decision to dismiss the appeal and take no action on the Motion to Withdraw and Vacate. (App. pp. 16-17. Petitioners argued the Court of Appeals was without jurisdiction to dismiss the appeal and that the issues regarding whether Petitioner may assert a class action against Respondents is appealable because it removed the class action allegations from the case rather than addressing the merits of class certification under Rule 23, SCRPC. *Id.*

As these events unfolded at the Court of Appeals, the parties filed briefs in this Court for Appellate Case No. 2015-001952. Petitioner addressed in his brief to this Court the issue of whether this action could be asserted as a class action against Respondents. Respondents, in their reply brief, objected to this Court considering the class action issue because, Respondents argued, the Court's Order granting the petition "did not specify that i[t] was going to consider the class action issue." (Reply Br. p. 12).

On April 13, 2016, the Court of Appeals issued an Order recalling the remittitur from the lower court and denying the petition for rehearing. (App. pp. 74-77). This Petition is timely filed.

Petitioner believes that the class action issue is properly before it in Appellate Case No. 2015-001952 in that Petitioner sought review of the issue in its return to the petition and that the issue is intertwined with the issue of interpretation of the scope of the RPA raised in Respondents' petition. Petitioner files this Petition in the event this Court disagrees that the class action is before it in Appellate Case No. 2015-001952 to ensure that it preserves the ability to have the issue heard.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DISMISSING PETITIONER'S APPEAL AS UNAPPEALABLE BECAUSE, ONCE THE SUPREME COURT GRANTED A PETITION FOR CERTIORARI IN AN APPEAL FROM THE SAME ORDERS, THE COURT OF APPEALS NO LONGER MAINTAINED JURISDICTION OVER THE CASE.

This case presents an unusual procedural history because the parties filed separate appeals from the same orders in separate courts. In this situation, this Court's decision to grant a petition as to orders results in this Court maintaining exclusive jurisdiction over an appeal from the orders.

Respondents sought review of the lower court's orders under Rule 245, SCACR, which addresses the "original jurisdiction" of the Supreme Court. "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*" *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) (emphasis added). When this Court granted Respondents' petition, it assumed jurisdiction over the case, thereby removing an appeal from the same lower court orders from the jurisdiction of the Court of Appeals. *See* Rule 242(d)(2) ("A question presented [in a petition] will be deemed to include every subsidiary question fairly comprised therein.").

That this Court's decision to hear an appeal from a lower court orders removes jurisdiction from the Court of Appeals to hear an appeal from the same orders is also evidenced by the fact that this Court may transfer jurisdiction of a case from the Court of Appeals to this Court. Under S.C. Code Ann. § 14-8-210(b), "[i]n any case pending before the court of appeals, the Supreme Court may in its discretion, . . . or on its own motion, certify the case for review by the Supreme Court before it has been determined by the court of appeals." "The effect of the certification shall be to *transfer jurisdiction* over the case to the Supreme Court *for all purposes*." § 14-8-210(b) (emphasis added).

This Court granted Respondents' petition on October 26, 2015. Therefore, on December 22, 2015, when the Court of Appeals dismissed Petitioner's appeal as unappealable, it did not have jurisdiction over the case. The Court of Appeals erred in taking action on a case over which it did not have jurisdiction.

II. THE CLASS ACTION ISSUE IS APPEALABLE BECAUSE IT REMOVED THE ISSUE FROM THE CASE RATHER THAN DENYING CLASS CERTIFICATION ON THE MERITS.

The Court of Appeals erred in dismissing the case as unappealable because it incorrectly construed the order as one denying class certification on the merits.

Petitioner brought the underlying case as a class action, on behalf of all similarly situated persons from whom the Defendants wrongfully charged and collected County and State admissions taxes. Respondents filed a Rule 12(b)(6), SCRCP, motion to dismiss all claims asserted against them or, in the alternative, to strike class allegations against SCDOR pursuant to Rule 12(f), SCRCP. (App. p. 48). Respondents argued that the lower court should dismiss the action under Rule 12(b)(6) or strike the class action allegations under Rule 12(f) because Petitioner is allegedly barred from asserting a class action against them pursuant to S.C. Code Ann. § 12-60-80(C). (App. pp. 48-49).

The lower court ruled that the RPA's mandatory exhaustion of administrative remedies did not apply to Petitioner's action regarding admission taxes but that § 12-60-80(C), a section of the RPA, applied to bar a class action against Respondents. Therefore, the court held "the Plaintiff cannot proceed against the Defendant SCDOR as a class action suit." (App. p. 85). The lower court did not rule on the merits of class certification under Rule 23, SCRCP, but, rather, granted Respondents' motion to dismiss the class action allegations based on its conclusion as a matter of law that no class action may be brought against SCDOR. *Id.* In its order denying Petitioner's Rule 59(e), SCRCP, motion, the lower court explained, "Plaintiffs may proceed as an individual against

all Defendants” but “[t]he class action allegations against the SCDOR and the State of South Carolina are ordered dismissed.” (App. p. 89). Petitioner appealed the portions of the lower court’s orders that dismissed the class action allegations based on the finding that they are prohibited by the RPA. (App. pp. 80-81).

In determining the appealability of an order, the court is “require[d] . . . to focus on the effect of the order, not the label given to the motion or to the order granting it.” *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303, 705 S.E.2d 475, 478 (Ct. App. 2011). In *Thornton*, the plaintiffs brought a class action arising out of blasting activities conducted by SCE&G. *Id.* at 300, 705 S.E.2d at 477. SCE&G made a motion to strike the class allegations, arguing the plaintiffs could not meet the Rule 23, SCRCP, elements required for class certification. *Id.* In dismissing an appeal from an order granting the motion to strike, the Court of Appeals noted that both the motion and the circuit court’s order “addressed the merits of class certification” under Rule 23. *Id.* at 301, 705 S.E.2d at 477-78. Rather than construing the order as one striking a pleading under S.C. Code Ann. § 14-3-330(2)(c), the Court of Appeals held the “order had the effect of [addressing and] denying class certification on the merits” rather than “remov[ing] an issue from the case.” *Id.* at 304, 705 S.E.2d at 479. Because the order denied class certification on the merits, and could be “altered or amended before the decision on the merits”, it was unappealable. *Id.* at 304-05, 705 S.E.2d at 479 (quoting Rule 23(d)(1), SCRCP). The reasoning of *Thornton* is applicable to this case.

In this case, neither the motion to dismiss or strike nor the lower court’s orders addressed the merits of class certification under Rule 23. Rather, unlike in *Thornton*, the lower court’s orders “had the effect of removing the issue of class certification from the case.” *Id.* at 305, 705 S.E.2d

at 480. Therefore, the orders dismissing Petitioner's class action allegations are immediately appealable. The Court of Appeals erred in dismissing the appeal as unappealable.

III. THE LOWER COURT ERRED IN DISMISSING THE CLASS ACTION ALLEGATIONS AGAINST PETITIONER.

Petitioner asserts the merits of the issue of whether the lower court erred in dismissing the class action allegations are properly raised in pending Appellate Case No. 2015-001952. For brevity, Petitioner incorporates into this Petition the arguments on pages 15-22 of its Final Brief in Appellate Case No. 2015-001952 regarding this issue.

CONCLUSION

Petitioner requests this Court address the properly raised issue of whether the lower court erred in dismissing the class action allegations in the pending appeal in Appellate Case No. 2015-001952. Alternatively, Petitioner requests the Court grant this Petition, vacate the Court of Appeals order dismissing the appeal, and address the merits of the appeal.

Dated: May 10, 2016

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PROOF OF SERVICE

The undersigned certifies that a copy of the *Petition for a Writ of Certiorari* and *Appendix*
has been served upon the following counsel by mailing a copy of the same, postage prepaid, in the
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