

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Hon. J.C. Nicholson, Jr., Circuit Court Judge

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Appellate Case No. 2017-000599

Case No. 2015-CP-10-1901

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**RECEIVED**

APR 03 2017

S.C. SUPREME COURT

David Engelman, Betty S. Engelman, and Robert E. Welch, Jr., on behalf  
of themselves and others similarly situated, and Charleston County .....Plaintiffs/Respondents,

v.

Town of James Island, South Carolina .....Defendant/Appellant.

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**APPELLANT’S RETURN TO CHARLESTON COUNTY’S MOTION TO DISMISS  
APPELLANT’S APPEAL**

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Appellant, the Town of James Island (the “Town”), in Return to Respondent Charleston County’s Motion to Dismiss the Town’s Notice of Appeal, requests that this Court deny the County’s Motion.

**BACKGROUND PROCEDURAL HISTORY**

Through their amended class action complaint filed April 21, 2015, Plaintiffs allege the Town violated the Local Option Sales Tax (LOST) statute<sup>1</sup> and they seek the “return” of certain Property Tax Credit Fund revenue that the Town received from the Department of Revenue under various theories. (Appx. pp. 311-326).

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<sup>1</sup> S.C. Code Ann. §§ 4-10-10 *et seq.*

On September 21, 2015, the Town moved for summary judgment, arguing, *inter alia*, that the South Carolina Revenue Procedures Act (the “Act”),<sup>2</sup> barred Plaintiffs’ case from proceeding in circuit court because: (a) Plaintiffs failed to exhaust administrative remedies; and (b) the Act prohibits a class action suit. (Appx. pp. 213-230). On December 9, 2015, the Town’s motion for summary judgment was heard before the Honorable J.C. Nicholson, Jr.<sup>3</sup> On July 7, 2016, Judge Nicholson entered an Order: (i) *sua sponte* enjoining the Town from “spending, crediting, dissipating, or otherwise obligating for expenditures of Local Option Sales Tax (LOST) funds yet to be acquired or currently held until final resolution of this action[,]” and (ii) *sua sponte* adding Charleston County as a necessary party to this action pursuant to Rule 19, SCRCPP. Judge Nicholson denied the Town’s motion for summary judgment.<sup>4</sup> (Appx. pp. 2-15).

Thereafter, the Town moved the circuit court to reconsider, alter or amend its July 7, 2016 Order in several respects, specifically requesting the circuit court to rule on whether the Plaintiffs’ claims were subject to the Act. (Appx. 019-211). Prior to the hearing on the Town’s motion to reconsider, Charleston County (the “County”) filed a motion to dismiss, arguing, like the Town, that Plaintiffs’ suit is subject to the Act, which requires exhaustion of administrative remedies and prohibited class action suits. The County’s motion to dismiss was consolidated with the Town’s then-pending motion for reconsideration and heard by Judge Nicholson on November 7, 2016.

On February 8, 2017, Judge Nicholson issued an Order supplementing his July 7, 2016 Order; however, Judge Nicholson did not address the applicability of the Act. Judge Nicholson left the injunction in place, except as modified, and the County remained a party to the case.

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<sup>2</sup> S.C. Code Ann. §§ 12-60-10 to 3390.

<sup>3</sup> Plaintiffs’ cross motion for summary judgment was heard at the same time.

<sup>4</sup> Judge Nicholson also denied the Plaintiffs’ Motion to Summary Judgment. (Appx. 2-15).

On March 13, 2017, the Town timely appealed the *sua sponte* injunction and filed a Petition for Extraordinary Relief, including its request for a Writ of Certiorari and Request for Stay (the “Petition”). In the Town’s Petition it sought review in this Court’s appellate jurisdiction of the trial court’s *sua sponte* injunction as well as a writ of extraordinary relief to review, *inter alia*, whether the Act requires Plaintiffs to exhaust their administrative remedies and bars their class action suit.<sup>5</sup>

### ARGUMENT

In its motion to dismiss, the County concedes that it “does **not** contend that [the Town] cannot appeal an order granting an injunction or temporary injunction directly to the Supreme Court.” (Mot. to Dismiss p. 2) (emphasis added). Nonetheless, the County maintains the instant appeal should be dismissed because the underlying case is “not of the type of case contemplated for direct appeal to the Supreme Court pursuant to Rule 203, SCACR.” *Id.* This argument is fatally flawed in both form and substance, and its motion should be denied.

#### **A. Dismissal of the Town’s Appeal is not Proper or Warranted.**

Pursuant to S.C. Code Ann. § 14-3-330, it should be without question that “The Supreme Court shall have appellate jurisdiction [over] . . . [a]n interlocutory order or decree in a court of common pleas granting, continuing modifying, or refusing an injunction . . . .” S.C. Code Ann. §14-3-330(4). Accordingly the Town has the right to seek appellate review of the circuit court’s *sua sponte* injunction. Even if the County has standing to oppose the Town’s appeal, which the

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<sup>5</sup> Like the Town, the County agrees that Plaintiffs cannot maintain the instant action because it is subject to the Act and therefore requires exhaustion of administrative remedies and is subject to the Act’s prohibition on class action suits. Thus, the County’s opposition to the Town’s request to have this Court decide the applicability of the Act in order to avoid a lengthy trial and appeals process is confusing.

Town disputes,<sup>6</sup> the County's argument does not challenge the Town's right of appeal, but instead merely disputes whether the appeal should be to this Court or the Court of Appeals. This alone is fatal to its motion to *dismiss* the appeal. See Rule 204(a) (if the notice of appeal is filed in the wrong appellate court an order shall issue transferring the case to the appropriate appellate court).

In sum, the County has failed to set forth any legal or procedural basis to warrant dismissal of the Town's appeal. To the contrary, the County acknowledges the right of the Town to seek appellate review of the *sua sponte* injunction. (Mot. to Dismiss. p. 2).

**B. The County's Argument Regarding Rule 203, SCACR, Does Not Warrant Dismissal.**

To start, the County's argument that the instant appeal does not satisfy Rule 203, SCACR, is of no consequence because Rule 203 is not the only basis on which the Town seeks relief. Instead, the Town is requesting that this Court review the threshold determination of whether the Act applies and deprives the circuit of jurisdiction to issue the *sua sponte* injunction. This Court's authority to grant extraordinary relief as set forth in Rule 245, SCACR, is invoked because such relief serves the interest of judicial economy, and could save substantial time and taxpayer resources. See e.g., *Brad Lightner v. Hampton Hall Club Inc., et al.*, Op. No. 27700 (S.C. Sup. Ct. filed February 1, 2017) (granting a request for extraordinary relief in matter seeking a ruling on the applicability of the Act). While Rule 203 offers some analogy to support the extraordinary

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<sup>6</sup> To the extent the County is moving to dismiss the Town's appeal of the *sua sponte* injunction, it lacks the standing to do so because the County has no stake in the outcome of *the Town's* appeal from the injunction. Only a party aggrieved by an order, judgment, or sentence may participate in the appeal. See S.C. Code Ann. §18-1-30; Rule 201(b), SCACR, *Burns v. Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997); Toal, *Appellate Practice in South Carolina*, 2Ed. p. 108 (2002); see also *Biven v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970) (finding a party is prohibited from appealing a ruling of the trial court no matter how "erroneous and prejudicial it may be to the rights and interest of some other person") (emphasis added). To the extent the County is aggrieved, its decision not to appeal has no effect whatsoever on the Town's right to appeal. See S.C. Code Ann. § 14-3-330(4).

relief the Town seeks<sup>7</sup>, the Town’s Petition is based on Rule 245 – for which the County offers no opposition in its motion to dismiss. The Town’s appeal, as noted above, is also proper pursuant to S.C. Code Ann. § 14-3-330(4).

In addition, the County’s legal argument is substantively flawed because it incorrectly presumes that Rule 203 is the sole basis on which a direct appeal can be taken to the Supreme Court. This presumption is not true. Rather, Rule 203 only provides those limited situations in which a direct appeal to the Supreme Court is **mandated** as opposed to permitted. Contrary to the County’s position, Rule 203 does not limit the types of cases that might otherwise be appealed directly to the Supreme Court—quite the opposite, it simply sets forth the types of cases that **cannot** be appealed to the South Carolina Court of Appeals. *See* S.C. Code Ann. §14-8-200(b) (defining the limitation of the Court of Appeals’ jurisdiction and reading verbatim to Rule 203) (emphasis added). The distinction is significant because the Supreme Court retains the right to review a matter regardless of whether it falls within the ambit of Rule 203. *See e.g.* Rule 204(b), SCACR (providing the Supreme Court may, in its own discretion and on its own motion, certify a case before it has been decided by the Court of Appeals); Rule 245(b) (permitting review upon writ of extraordinary relief); *see also e.g., S.C. Dep’t of Parks v. Brookgreen Gardens*, 309 S.C. 388, 389, 424 S.E.2d 465, 465 (1992) (granting extraordinary relief and addressing a question of ownership interest in real property pursuant to the prior version of Rule 245 despite the fact that this type of case is not contemplated by Rule 203).

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<sup>7</sup> While not dispositive, Rule 203, SCACR, offers support as to why this Court should grant the Town’s requested relief under Rule 245, SCACR. Contrary to the County’s argument, and notwithstanding the absence of a final order, this case “involves . . . **revenue** . . . of the counties and municipalities” of the State, as contemplated by Rule 203(1)(a)(iii)(emphasis added). The County ignores the “revenue” language of Rule 203 and focuses only on bonded indebtedness.

Finally, even if the County is correct, and review by this Court is not proper, dismissal is not the proper remedy. Instead, the matter must be remanded to the Court of Appeals. *See* Rule 204(a), SCACR (“In the event that the notice of appeal is filed in the wrong appellate court the appellate court in which the matter was filed shall issue an order transferring the case to the appropriate appellate court.”). Again, this demonstrates why dismissal is improper.

Ultimately, the Town properly seeks appellate review of the circuit court’s *sua sponte* injunction. Because this injunction presents an immediately appealable order, this Court has the opportunity to address, *inter alia*, the applicability of the Act to this case in order to “serve the interests of judicial economy by eliminating [the] inevitable appeals.” *In re Breast Implant Prod. Liab.*, 331 S.C. 540, 554, 503 S.E.2d 445, 452 at n. 2 (1998).

If the Act applies, the injunction must be vacated and no further action should occur in the circuit court beyond dismissing the action in favor of the administrative remedies provided in the Act. It is for this reason that the Town Petitions this Court to exercise its authority to address the merits of this case, in particular the applicability of the Act, which is germane to the validity of the injunction. *See Lightner*, Op. No. 27700 (granting a request for extraordinary relief to review the applicability of the Act to a purported class action suit involving a dispute over taxes). Either way, it is still without question that the Town is entitled to appeal from the circuit court’s *sua sponte* injunction, as explained herein. The County has offered no basis warranting dismissal of the Town’s appeal.

### **CONCLUSION**

For the reasons set forth herein, this Court should deny the County’s Motion to Dismiss.

Respectfully submitted,

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James Island, South Carolina*

March 30, 2017,  
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v.

TOWN OF JAMES ISLAND, SOUTH CAROLINA .....Defendant/Appellant.

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**AFFIDAVIT OF SERVICE**

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I certify that I have served the Appellant's Return to Charleston County's Motion to Dismiss Appellant's Appeal on all counsel of record, in accordance with Rule 262(b), SCACR, by depositing a copy in the United States Mail, postage paid, to the following:

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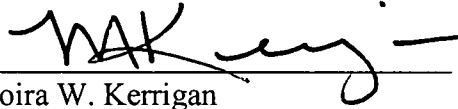
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Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'MAK Kerrigan', written over a horizontal line.

Moira W. Kerrigan  
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March 30, 2017.  
Charleston, South Carolina