

In the State of South Carolina
In the Court of Appeals

Appeal from Orangeburg County
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

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Case No. 2012-CP-38-00837

SEP 05 2017

SC Court of Appeals

Jimmie Aiken, Leila Brown, Vernonda Cohen, Carla David, Anthony Sabb, James Ginn, and Shirley Rice, as named Plaintiffs representing a class of South Carolina citizens Respondents

vs.

South Carolina Department of Revenue..... Appellant

Respondents' Motion to Dismiss the Appeal

This appeal is from an order on “whether S.C. Code Ann. § 12-60-80(C) bars the Court from considering whether to certify this action as a class action[.]” Order Sought to be Appealed, p. 1. The order concludes, “The Court may consider whether to certify this action as a class action.” *Id.*, p. 7.

The appeal must be dismissed because “[t]he general rule established by this [Supreme] Court is that class certification orders are not immediately appealable.” *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 448, 661 S.E.2d 81, 85

(2008). This is so for several reasons. An order certifying a class is not final but “may be altered at any time prior to a decision on the merits.” *Id.* at 454, 661 S.E.2d at 88. “Neither does certification reach the ‘merits’ of the underlying cause of action[.]” *Knowles v. Standard Savings and Loan Ass’n*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979). “Class certification, essentially procedural in nature, [also] does not involve substantial or essential legal rights which require attention prior to final judgment.” *Id.*, 261 S.E.2d at 49. And lastly, orders certifying a class “do not prevent a judgment from which an appeal may be taken nor do they discontinue the action.” *Salmonsens*, 377 S.C. at 452, 661 S.E.2d at 87; *see also Schein v. Lamar*, 274 S.C. 329, 331, 263 S.E.2d 383, 384 (1970)(dismissing an appeal from an order certifying a class).

The Department may respond that the order strikes its pleaded defense that § 12-60-80(C) bars a class action. But this goes only to the propriety of a class action. Avoiding a class action does not involve the merits or a substantial right. *Knowles*, 274 S.C. at 59, 261 S.E.2d at 49; *Thornton v. South Carolina Elec. & Gas Corp.*, 391 S.C. 297, 301-305, 705 S.E.2d 475, 477-480 (Ct.App. 2011)(dismissing an appeal from an order striking pleadings because the stricken pleadings went only to the class allegations).

The Department may also try to single out the circuit court’s refusal to reconsider whether the Revenue Procedures Act applies. Order, p. 2. In

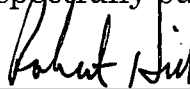
December 2012, the circuit court disagreed with the Department's view of the Act and denied the Department's motion to dismiss. Order, p. 2. Orders denying a motion to dismiss for lack of subject matter jurisdiction, and for failing to state a claim, are also not immediately appealable. *Levi v. Northern Anderson County EMS*, 409 S.C. 374, 382, 762 S.E.2d 44, 48 (Ct.App. 2014). An order denying reconsideration is not immediately appealable if the underlying order is not immediately appealable. There is no Rule 59(e), SCRCP, exception to S.C. Code § 14-3-330.

To conclude, the order that the Department wants to appeal is much more preliminary than the unappealable orders in *Salmonsens*, *Schein*, and *Knowles* which actually certified a class. Here the court ruled only that it may consider whether to certify one. Order Sought to be Appealed, p. 7.

The appeal should be dismissed.

September 5, 2017
Lexington, SC

Respectfully submitted



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Attorneys for the Respondents

Certificate of Service

I certify that I on September 5, 2017 served the Respondents' Motion to Dismiss the Appeal by first class mail addressed to Dana R. Krajack, Esq., Sean G. Ryan, Esq., and Jason P. Luther, Esq, of the South Carolina Department of Revenue, Offices of General Counsel for Litigation, P.O. Box 12265, Columbia, SC 29211-9979.



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September 5, 2017

South Carolina Court of Appeals
P.O. Box 11629
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Hand Delivered

Re: Aiken, et. al. v. South Carolina Department of Revenue
Appellate Case No. 2017-001790

Dear Clerk of Court:

Enclosed is the unbound original and 6 bound copies of the Respondents' Motion to Dismiss the Appeal. The certificate of service is at the bottom of the motion.

Also enclosed the a \$25 check for the filing fee.

Please call me if you have any questions.

My best,



Robert Hill

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SC Court of Appeals

cc: Mark B. Tinsley, Esq.
Charles H. Williams, Esq.
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Dana R. Krajack, Esq.
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