

In the State of South Carolina  
In the Court of Appeals

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Appeal from Orangeburg County  
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

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Case No. 2012-CP-38-00837

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SEP 20 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

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**Respondents' Reply in Support of  
Motion to Dismiss the Appeal**

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On September 5, 2017, this Court *sua sponte* questioned whether the order on appeal is immediately appealable and asked for memoranda on the issue. The Department of Revenue's memoranda was styled to include what it called a "reply" to Respondents' pending motion to dismiss the appeal. Respondents briefly address the Department's memoranda.

**I. The order only involves whether a class action may be certified.**

The order on appeal does not involve the merits. At issue on the merits is the constitutionality of statutes which purportedly allow the Department to garnish wages to collect medical bills and certain other delinquent debts. Department's Memoranda, Ex. A (Amended Complaint). Respondents claim that the statutes are unconstitutional and seek in part refunds of certain sums that they claim were wrongfully garnished. *Id.* In contrast, the order on appeal ruled only that, "The Court may consider whether to certify this action as a class action." Department's Memoranda, Ex. C, p. 7.

This ruling falls squarely within the Supreme Court's holdings that class certification orders are not immediately appealable. In particular, "[c]lass certification, essentially procedural in nature, does not involve substantial or essential legal rights which require attention prior to final judgment."

*Knowles v. Standard Savings and Loan Ass'n*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979). So it makes little sense to say that whether a court may certify a class implicates rights that are more substantial than those implicated when a court in fact certifies a class. Neither ruling affects the merits. Neither ruling prevents a judgment from which an appeal may be taken.

Labeling the purported right to avoid a class action as a statutory "immunity" also does not help. The effect, not the label, is the issue and the

effect here goes only to whether a class may later be certified. *Thornton v. South Carolina Elec. & Gas Corp.*, 391 S.C. 297, 304-305, 705 S.E.2d 475, 479 (Ct.App. 2011).

Besides, the Supreme Court has repeatedly dismissed appeals from orders denying various claims of immunity. *See State v. Rearick*, 417 S.C. 391, 790 S.E.2d 192 (2016)(order denying claim of immunity under the double-jeopardy clause is not immediately appealable); *State v. Issac*, 405 S.C. 177, 747 S.E.2d 677 (2013)(same; claimed immunity under the Protection of Persons and Property Act); *Brown v. County of Berkeley*, 366 S.C. 354, 622 S.E.2d 533 (2005)(same; claimed immunity under the Tort Claims Act).

At issue with all these claimed immunities is whether the claim involves rights that are substantial enough to review immediately or whether review may await a final judgment. For issues over class certification, the Supreme Court said wait. *Knowles*, 274 S.C. at 59, 261 S.E.2d at 49, *citing Coopers and Lybrand v. Livesay*, 437 U.S. 463 (1974).

## **II. The mode of trial argument is misplaced and belated.**

The Department lastly suggests that the ruling it really wants to contest is Judge Goodstein's refusal to reconsider a ruling—made in December 2012—that the Revenue Procedures Act does not bar the Respondents from suing the Department in circuit court. Department's Memoranda, p. 6.

The point is misplaced. The December 2012 ruling was made on the Department's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. Neither ruling is immediately appealable. *Levi v. Northern Anderson County EMS*, 409 S.C. 374, 382, 762 S.E.2d 44, 48 (Ct.App. 2014). And the Supreme Court in 2008 clarified that the "mode of trial" exception to the final judgment rule "is confined to orders which abridge a party's constitutional right to a trial by jury." *Fulmer v. Cain*, 380 S.C. 466, 470 670 S.E.2d 652, 654 (2008). Nothing in the order on appeal abridges the Department's constitutional right to a trial by jury.

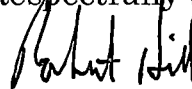
The point is also years late. The Department ironically notes that orders which go to the mode of trial must be appealed immediately. Department's Memoranda, p. 5; *see also Foggie v. CSX Trans. Inc.*, 313 S.C. 98, 431 S.E.2d 587 (1993)(dismissing an appeal affecting the mode of trial because it was not appealed immediately). If the December 2012 ruling goes to the mode of trial, as the Department contends, it had to appeal by January 2013. Waiting until 2017 is too late.

In sum, the appeal should be dismissed because class certification orders are not immediately appealable and because the "mode of trial" point is unavailing.

September 20, 2017

Lexington, SC

Respectfully submitted



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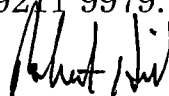
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SC Court of Appeals

Attorneys for the Respondents

### Certificate of Service

I certify that I on September 20, 2017 served the Respondents' Reply in Support of 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 20, 2017

South Carolina Court of Appeals  
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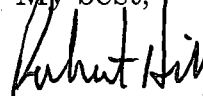
Dear Clerk of Court:

SC Court of Appeals

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

Please call me if you have any questions.

My best,



Robert Hill

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