

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Doyet A. Early, Circuit Court Judge

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NOV 15 2017

Appellate Case No. 2017-001208
Case No. 2013-CP-06-0059

SC Court of Appeals

Archie Patterson and Tami Bollerman, Respondents,

v.

South Carolina Department of Employment and Workforce, Appellant.

MOTION TO DISMISS

Respondents move to dismiss this appeal, since all orders from which the appeal is taken are interlocutory and not immediately appealable. Appellant appeals 1) the lower court's May 5, 2016 order certifying this case as a class action; 2) the lower court's April 12, 2017 order finding Respondents had standing to proceed as class representatives; 3) the October 27, 2017 order denying Appellant's 59(e) Motions to both Orders. Instead of filing a separate memorandum, Respondents set forth their argument for dismissal in this motion.

BACKGROUND

In this action filed February 14, 2013, Respondents allege Appellant was required to promulgate regulations before implementing procedures which require claimants for unemployment benefits to perform online employment searches through Appellant.

Respondents' complaint seeks class certification for those who were denied benefits for failure to comply with the online work search requirement.

On January 11, 2016, the trial court heard cross-motions for summary judgment as well as Respondents' motion for class certification. The Court denied both parties motions for summary judgment, but granted Respondents' motion to certify the class.

Appellant filed a Rule 59(e) motion to alter or amend the class certification order, and a hearing on this motion was held on June 7, 2016. At the hearing, counsel for Appellant argued that the Court did not address his assertion that the named Respondents lacked standing and could not adequately represent the class. This hearing concluded with the Appellant reserving all other issues raised in his Rule 59(e) motion and the parties agreeing to confer on a way to address this issue.

As a result, on June 15, 2016, Appellant filed a motion for an evidentiary hearing on the issue of standing. Respondents consented to the motion. Hearings were held on November 2, 2016 and January 11, 2017. As a result this court issued its order dated April 27, 2017 (standing order), finding the remaining named Respondents had standing to maintain this action as a class action. No other finding was reached by the court. Appellant timely filed a 59(e) motion to the Standing Order, and then filed this appeal. After filing the appeal, Appellant moved to remand the case for the limited purpose of hearing the 59(e) motions for both orders. This Court remanded the case by orders filed August 3, 2017, and August 24, 2017. On October 2, the trial court held a hearing on both 59(e) motions.

On October 27, 2017, the Court issued its order denying Appellant's motions to alter or amend the class certification order and the standing order. The Court specifically ruled "nothing in either order should be construed as a decision on the merits and all issues raised in the pleadings are preserved."

DISCUSSION

This Court recently issued its opinion in Tilman v. Tilman, 420 S.C. 249, 801 S.E.2d 757 (2017) regarding the appealability of lower court orders. In Tilman, the court opined:

“Generally only final judgments are appealable. Doe v. Howe, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004) *249 (“ ‘Final judgment’ is a term of art referring to the disposition of all the issues in the case.”). A final judgment is one that ends the action and leaves the court with nothing to do but enforce the judgment by execution. Good v. Hartford Acc. & Indem. Co., 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942). An order reserving an issue, or leaving open the possibility of further action by the trial court before the rights of the parties are resolved, is interlocutory. Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005).”

S.C. Code Ann. §14-3-330 does allow appeals from certain interlocutory orders which involve the merits of the case or affects Appellant’s substantial rights in actions such as striking a pleading, *Id.* However, “[t]o avoid circuitous litigation and needless appeals, §14-3-330 is construed narrowly, eyeing the nature and effect of the order, not merely its label.” *Id.* at 420 S.C. 250, 801 S.E.2d 760, citing Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 538, 7723 S.E.2d 144, 146 (2015); Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 302-04, 705 S.E.2d 475, 478-79 (Ct. App. 2011). These orders are interlocutory and not appealable.

CLASS CERTIFICATION ORDER

“[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; it “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 Association, 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 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).

STANDING ORDER

Standing is a fundamental prerequisite to instituting an action. *Youngblood v. South Carolina Dept. of Social Services*, 402 S.C. 311, 317, 741 S.E. 515, 518 (2013). Like subject matter jurisdiction, personal jurisdiction, and venue, standing is a threshold issue to be determined by the court before the court decides anything pertaining to the merits of the case. While Respondents are not aware of any case specifically addressing whether an order finding standing is immediately appealable, the Supreme Court has found denial of motions to dismiss based upon other threshold issues were not immediately appealable. *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E. 2d 392 (1995) (denial of a motion to dismiss for lack of subject-matter jurisdiction not immediately appealable), *Mid-State Distributors v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E. 2d 777 (1993) (finding denial of a motion to dismiss for lack of personal jurisdiction not immediately appealable), *Breland v. Love Chevrolet Olds, Inc.* 339 S.C. 89, 529 S.E.2d 11 (2000) (finding denial of a motion to dismiss/change venue not immediately appealable). See also *Burkey v. Noce*, 398 S.C. 35, 726 S.E.2d 229 (2012)

In *Woodard*, the Court noted “[a]n order denying a motion to dismiss for lack of subject matter jurisdiction does not determine anything. (internal citation omitted) Consequently, while such orders may involve a substantial right, they do not fall under §14-3 330(2)(a) because they do not in effect determine the action [,nor do they] involve the merits under §14-3-330 (1)” *Id.* At 319 S.C. 243, 460 S.E.2d 394 (fn. 2). Likewise, an order concluding that

Respondents have standing to represent the class does not determine anything. It merely allows the class action to proceed.

Had Appellant filed a motion under S.C.R.C.P. 12(b)(6) to dismiss for lack of standing, denial of that motion would not be immediately appealable. *Burkey supra* (denial of 12(b)(6) motion generally not appealable). The nature and effect of the standing order is to continue the action. The Order did not decide the merits of the case. Moreover, all issues raised in the pleadings are preserved. No substantial right as contemplated by §14-3-330 (2) is affected.

59(e) ORDER

If there remotely was any question regarding the appealability of the class certification order and the standing order, the 59(e) order removes any doubt. It expressly provides: "Nothing in either order should be construed as a decision on the merits and all issues raised in the pleadings are preserved. Moreover, a motion for reconsideration is not immediately appealable unless the underlying order is appealable. The appeal should be dismissed.

CONCLUSION

For the reasons set forth above, this appeal should be dismissed without prejudice and remanded to the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned employee of BEDINGFIELD & WILLIAMS, LLC, co-counsel for the Respondents, does hereby certify that I have served a copy of the enclosed Motion to Dismiss in the above captioned matter by mailing a copy of same by United States Mail, postage prepaid, to the following addresses on November 13, 2017.

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A handwritten signature in black ink, appearing to read "Andrea S. Reed", written over a horizontal line.

Andrea S. Reed
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November 13, 2017

The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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SC Court of Appeals

Re: Archie Patterson, Tami Bollerman vs. SC Department of Employment and Workforce
Court of Appeals Tracking Number: 2017-001208
Civil Action Number: 2013-CP-06-059

Dear Ms. Kitchings:

In connection to the above aforesaid matter, you will find the original and seven (7) copies of the Motion to Dismiss. Please file the original and return a clocked-in copy of the same to me in the stamped reply envelope provided. I have enclosed the necessary filing fee as required in this matter.

By copy of this letter to all counsel of record, I am hereby serving a copy of the Motion to Dismiss upon them. Thank you for your courtesies in this matter.

Sincerely,



Daniel W. Williams

DWW:ar
Enc.

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