

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Circuit Court of Richland County, South Carolina

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-40-02523

Appellate Case No.: 2018-000005

RECEIVED
JAN 18 2018
SC Court of Appeals

State Media Company, The Post and Courier, Inc., Gannet GP Media, Inc., South Carolina Press Association, South Carolina Broadcasters Association, The Associated Press, Respondents,

v.

South Carolina House Republican Caucus, Appellant.

APPELLANT'S MEMORANDUM ON APPEALABILITY

At the request of the Court, South Carolina House Republican Caucus ("Appellant" or "House Caucus") submits this Memorandum of Law on the issue of appealability.

The underlying action initiated by the Respondents, all members of media organizations, sought to require Appellant to respond to certain demands under the South Carolina Freedom of Information Act ("FOIA"). Appellant is a party caucus of the South Carolina House of Representatives. Prior to the filing of the lawsuit, Appellant had received certain FOIA demands from the Respondent State Media Company and refused to produce the requested state grand jury documents on the basis of the Appellant's exclusion from FOIA under Rule 4.5 of the Rules of the South Carolina House of Representatives ("House Rules") (provided to the Court as Exhibit B to Appellant's Return to Motion to Dismiss).

In response to the Amended Complaint, Appellant filed a Motion to Dismiss, asserting that the dispute represented a nonjusticiable political question. By Order dated November 9, 2017, the Honorable G. Thomas Cooper, Jr., denied Appellant's Motion to Dismiss. In denying Appellant's Motion to Dismiss, the circuit court determined that the matter was justiciable and also held that Rule 4.5 of the House Rules was unconstitutional. Appellant sought reconsideration of the Order, which was denied by Order dated December 11, 2017. The Orders are immediately appealable under South Carolina Code Sections 14-3-330(1) and (2).

This appeal challenges both the propriety of judicial action in response to a political question, as well as the dispositive finding of unconstitutionality of a legislative rule well beyond the scope of the underlying Motion. Appellant submits that either of these reasons supports an immediate appeal. In pertinent part, Section 330 provides:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) **Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;**

(2) **An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;**

S.C. Code Ann. §§ 14-3-330(1) and (2) (emphasis added).

In the Order Denying Motion to Dismiss, the circuit court both held the matter justiciable and eliminated Appellant's primary defense to the action by finding the House Rule unconstitutional. The ruling eliminating Appellant's defense was made without the development of any substantive record on the question of constitutionality, and that was because *the issue was*

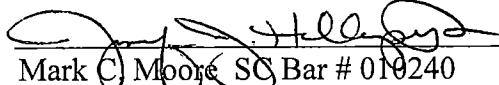
not before it. Directly on point for the propriety of this Court's review is *Brown v. County of Berkeley*, 366 S.C. 354, 622 S.E.2d 533 (2005). The rule of law espoused in *Brown* affirms that "[i]t is well settled that an interlocutory order is not immediately appealable *unless it involves the merits of the case or affects a substantial right*." *Id.* at 361, 622 S.E.2d at 537 (emphasis added). The justiciability ruling clearly involves the merits and the constitutionality ruling affects a substantial right of Appellant, therefore both are appropriate for immediate appeal.

In *Brown*, a dispute arose between members of the Berkeley County Council and the Berkeley County Clerk of Court. In her tort action against the County, County Council and individual Council members, the Clerk of Court sought damages for defamation and related claims. The individual defendants appealed an order denying their motion to dismiss, on the basis of immunity and the Supreme Court analyzed whether the order denying the motion to dismiss was immediately appealable. Relevant and critical to the Supreme Court's conclusion that the order was not immediately appealable was that "the individual council members will be free to raise such issues as qualified immunity, qualified privilege and the provisions of the Tort Claims Act, at later stages of this case." *Brown* at 362, 622 S.E. 2d at 538.

The circuit court's Order strikes one of Appellant's defenses: the House Caucus's exemption from FOIA under House Rule 4.5. In considering the holding in *Brown*, because of the finding on constitutionality, Appellant is unable to raise the defense of the House Rule at later stages of the case. In *Murphy v. Owens-Corning Fiberglas Corp.*, 346 S.C. 37, 550 S.E.2d 589 (2001), this Court held that the dismissal of some but not all defendants in a case was immediately appealable under Section 330(2) "because it affects a substantial right *and strikes out part of a pleading*." *Id.* at 45, 550 S.E.2d at 593, *overruled on other grounds by* 353 S.C. 553, 579 S.E.2d 325 (emphasis added).

The Supreme Court closely examined when an appeal was impermissibly premature in *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993). Though *Mid-South* dealt with denial of a motion to dismiss based on personal jurisdiction, nonetheless the Supreme Court explained that the defendant “still may show that there is a lack of personal jurisdiction at trial, and may still be entitled to other procedural relief based on the evidence.” *Id.* at 335, 426 S.E.2d at 781. More importantly, the Supreme Court noted in a footnote that “§ 14-3-330 also allows appeal from an order affecting a substantial right. This is when such order would discontinue an action, prevent an appeal, grant or refuse a new trial, *or strike out an action or defense.*” *Id.* at n.4 (emphasis added). By the Orders under appeal here, Appellant is foreclosed from raising the reliance on the procedural rule of the House of Representatives when defending Respondents’ claim. As such, Appellant respectfully submits that the Order Denying Motion to Dismiss and subsequent Order Denying Reconsideration are immediately appealable because the Orders involve the merits and/or affect a substantial right by summarily eliminating Appellant’s primary defense. While there are other reasons for reversal of the circuit court’s orders, appellate jurisdiction is appropriate pursuant to South Carolina Code Sections 14-3-330 (1) and (2) and legal precedent.

RESPECTFULLY SUBMITTED,



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January 18, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

The undersigned hereby certifies that on January 18, 2018, she caused a copy of the Appellant's Memorandum on Appealability to be served to the following addresses via hand delivery:

Jay Bender, Esquire
Baker, Ravenel & Bender, LLP
3710 Landmark Drive, Suite 400
Columbia, SC 29204



Jennifer A. Hollingsworth

Jennifer J. Hollingsworth
Member
Admitted in SC

January 18, 2018

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

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Re: *South Carolina House Republican Caucus, Appellant v. State Media Company, The Post and Courier, Gannet GP Media, Inc., South Carolina Press Association, South Carolina Broadcasters Association, The Associated Press, Respondents.*
Appellate Case No. 2018-000005
Lower Court Case No. 2017-CP-40-02523

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Charlotte
Columbia
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Raleigh

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Appellant's Memorandum on Appealability in the above-referenced matter.

Please return a file-stamped copy to our office via our courier.

Very truly yours,


Jennifer J. Hollingsworth

JJH/ect
Enclosures

cc: Jerry Jay Bender, Esquire (via hand-delivery)