THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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SC Court of Appeals

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

Appeal Dismissed by Order filed February 1, 2018

Lorenda Robinson, Elaine Nix, Archie Patterson, and Tami Bollerman, ... Plaintiffs,

Of Whom, Archie Patterson and Tami Bollerman are ..... Respondents,

v.

South Carolina Department of Employment and Workforce, Petitioner-Appellant.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner-Appellant certifies that its Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on February 1, 2018. App. 1-2.

QUESTIONS PRESENTED

1. Whether the circuit court's dismissal of DEW's defenses pertaining to standing, justiciability, mootness and mitigation of damages is immediately appealable, because it affected substantial rights and effectively struck several defenses.
2. Whether the Court of Appeals erred in dismissing this appeal, based on a conclusion that the issue on appeal pertained to class certification, rather than to the striking of defenses.
3. Whether, if the Court permits the appeal on standing and other defenses to proceed, it would be permissible and efficient to consider class certification as well.

STATEMENT OF THE CASE

This appeal concerns two Orders of the circuit court holding that two Plaintiffs (Respondents) have standing. Appellant (Defendant), the Department of Employment and Workforce ("DEW"), submits that in so holding, the Order effectively "strikes out an answer or any part thereof. . . ." S. C. Code Ann. § 14-3-330(2)(c). The part of the Answer stricken was the defense of standing.

A. Procedural History.

In this action filed February 14, 2013, Plaintiffs (Respondents) have claimed that Appellant (DEW) was required, between certain dates in 2012 and 2016, to

promulgate regulations before implementing procedures which require claimants for unemployment benefits to perform online employment searches through DEW's website. Plaintiffs sought 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 Plaintiffs' motion to certify the class. DEW filed a Rule 59(e) motion to alter or amend the class certification order, and a hearing on that motion was held on June 7, 2016. At the hearing, counsel for DEW 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 DEW 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, DEW filed a motion for an evidentiary hearing on the issue of standing. Plaintiffs consented to the motion. Hearings were held on November 2, 2016 and January 11, 2017. As a result, the circuit court issued an order dated April 27, 2017, holding that two Plaintiffs (the only ones left whose claims were not abandoned by Plaintiffs' counsel) had standing to maintain this action as a class action. App. 78-85. No other finding was reached by the court.

DEW timely filed a 59(e) motion to the Standing Order, and then filed this appeal on May 22, 2017. App. 75. After filing the appeal, Appellant moved to remand the case for the limited purpose of hearing the 59(e) motions for both orders. The Court of Appeals remanded the case by orders filed August 3, 2017, and August 24, 2017. App. 72, 74.

On October 2, 2017, the trial court held a hearing on both 59(e) motions, that is, on the issues remaining from the first motion and on the second motion in its entirety. On October 27, 2017, the circuit court issued its order denying Appellant's motions to alter or amend the class certification order and the standing order. App. 67. On November 2, 2017DEW filed an Amended Notice of Appeal, adding the October 27, 2017, Order. App. 48.

Plaintiffs-Respondents moved on November 13, 2017 to dismiss this appeal on the ground that the aforementioned Orders are not appealable at present. App. 42. On December 8, 2017, the Court of Appeals dismissed the appeal, holding that the underlying orders were not immediately appealable. App. 12. Appellant filed a Petition for Rehearing on December 18, 2017. App. 7, to which Respondents filed a Return. App. 3. The Court of Appeals denied that petition on February 1, 2018. App. 1. DEW now petitions this Court for a writ of certiorari.

B. Facts.

In this purported class action for declaratory and injunctive relief, Plaintiffs claim that at time between 2012 and 2016, DEW erroneously denied them one or more weeks of unemployment benefits. DEW based its denial on the fact that those individuals, who were required to conduct four work searches each week, did not perform one of the four through the SC Works Online System (SCWOS), an online workforce system operated by DEW. DEW has raised a number of defenses, including lack of standing by the Plaintiffs, but the simplest defense raised by DEW is that its procedure was authorized, and in fact, mandated by legislative provisos starting on July 1, 2012, and ending on June 30, 2016, at which time DEW did not continue the requirement. An example of those provisos is the one covering fiscal year 2012-2013, which read as follows:

> **67.7.** (DEW: SUTA Contingency Assessment Funds) Thirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers shall be spent on enforcement of Section 41-35-110(3) and Section 41-35-120(5) of the 1976 Code, via Eligibility Reviews, Random Verification of Job Contacts and Wage Cross Matches during those weeks covered by the South Carolina State Unemployment Tax Authority (SUTA), and to ensure seated meetings with Unemployment Insurance claimants and requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified.

(Emphases added.) Plaintiffs claim that DEW should not have imposed that requirement without a regulation.

In the course of considering whether to certify a class, the circuit court held two evidentiary hearings with regard to the standing of the two Plaintiffs who remain in the case. It is axiomatic, of course, that in order to serve as a class representative, the named plaintiff(s) must have standing. DEW showed at those hearings that, among other things, neither of the two named Plaintiffs could present evidence to prove that they had made four non-online job searches. In order to be entitled to benefits during the timeframe in question, all claimants must perform four job searches irrespective of the legislative mandate that one of the four searches be online. Even if Plaintiffs are ultimately successful in arguing that DEW could not have complied with this proviso absent a regulation, a person, such as Plaintiffs, who could not show four total job searches in some way, shape, or form would not meet the eligibility requirements of the law and, thus, not able to recover in this class action.

Stated simply, neither Plaintiff was able to prove that they had conducted four job searches during the week (one per person) in which they did not receive benefits. As a result, they lack standing to represent the purported class.

The first Order of the circuit court regarding standing, filed on April 27, 2017, was completely silent on this issue. App. 78-85. DEW filed a Rule 59(e)

motion pointing out that failure to rule on that issue. The Order filed on October 30, 2017, denying that motion, was summary in nature, and also did not address the need to make four offline job searches in order to have standing. App. 67-68.

DEW also contended that one of the Plaintiffs, Archie Patterson, had failed to mitigate his loss. He was eligible to recover the entire sum total of unemployment benefits available to him during the benefit year in question, but instead indisputably (and inexplicably) did not claim that full amount of benefits, leaving an unclaimed balance on his account for that benefit year. The proximate cause of his loss was therefore his own inaction rather than DEW's compliance with the legislative proviso. The circuit court merely held summarily that his inaction "does not cure or obviate any earlier wrongful denial of benefits," App. 82, although that holding is supported by no citations to applicable law.

The April 27, 2017 Order also held that standing was present for two other reasons, both untenable. The first was a conclusion that the facts of this case were capable of repetition, yet evading review. App. 82-83. However, those facts were not capable of repetition, because it is undisputed that the complained-of requirement ended on June 30, 2016. While the incapability of repetition is a complete answer to this assertion, Plaintiffs' claims also would not evade review, because there was nothing to stop the claim of a person who did not recover all

benefits to which he was entitled from being adjudicated, no matter how long it took of the issue to be finally decided.

The second untenable ground set forth in the April 27, 2017 Order was "public interest" standing. App. 83-85. However, the Supreme Court has held that "[t]he key to the public importance analysis is whether a resolution is needed for future guidance." *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)(emphasis added). Again, the legislature did not include this provision in a proviso for fiscal year 2015-16, and, as a result, DEW stopped applying the provision at issue, effective July 1, 2016. Thus, resolution of this case is not "needed for future guidance," and the requirements for the public interest standing are not met here.

The Order of October 30, 2017 did contain one variation from prior Orders, holding that "Nothing in either order should be construed as a decision on the merits and all issues raised in the pleadings are preserved." App. 68. The effect, if any, of that sentence on this appeal is discussed below.

ARGUMENT

1. The circuit court's dismissal of DEW's defenses pertaining to standing, justiciability, mootness and mitigation of damages is immediately appealable, because it affected substantial rights and effectively struck several defenses.

S.C. Code Ann. § 14-3-330(2) provides that

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> * * *
>
> (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;[1]

DEW raised the defenses of standing, absence of a justiciable controversy, mootness, and failure to mitigate damages in its Answer. App. 34-36. The circuit court's two Orders on standing unquestionably had the practical effect of striking out those defenses. There is no South Carolina case specifically addressing the issue of the appealability of an order holding that standing is present. However, the defense of standing and the other three defenses referenced above are without question matters that involve substantial rights of a defendant. If no plaintiff has

[1] This Court has held that at least some orders affecting substantial rights must be appealed immediately, or the right to appeal will be lost. *See, e.g., First Union Nat. Bank of S.C. v. Soden,* 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998).

standing, the entire case does not present a justiciable controversy and is effectively a hypothetical matter, for which any subsequent proceedings would amount to a waste of time of the courts and the parties. The circuit court orders therefore effectively struck the defense of the absence of a case or controversy as well.

Finally, by holding that Plaintiff Patterson's inaction "does not cure or obviate any earlier wrongful denial of benefits," App. 82, the circuit court effectively struck the defense of failure to mitigate damages and the defense of mootness as applied to him. His failure to claim benefits to which he was entitled and which would have eliminated any loss from his being disqualified for one week had the effect of rendering his claim in this case moot.

It is true that the Order of October 30, 2017 contained a sentence holding that "Nothing in either order should be construed as a decision on the merits and all issues raised in the pleadings are preserved," App. 68. However, the issue of standing was tried before the circuit court, with both named Plaintiffs appearing as witnesses, as well as several other persons. In light of the depth of the parties' presentations on this issue and DEW's two Rule 59(e) motions, there is no realistic reason to believe that the circuit court would later reconsider its Orders on this issue. In effect, the court affirmatively granted judgment for Plaintiffs on the issue

of standing, and arguably on the other defenses referenced above, rather than denying a motion for summary judgment by DEW on those grounds.

This Court has held that in considering whether an order is appealable, the court looks to the "nature and effect of the order, not merely its label. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015). As a result, any characterization by the circuit court of its order as being nonfinal does not govern appealability.

In the Court of Appeals, Plaintiffs cited a number of cases involving denials of motions to dismiss or denials of motions for summary judgment, both situations in which it has been repeatedly held that the denials of such motions do not establish law of the case and are not appealable. *See, e.g., Ballenger v. Bowen,* 313 S.C. 476, 443 S.E.2d 379 (1994). The cases cited by Plaintiffs included the following: *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995)(order denying motion to dismiss); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993)(same); *Burkey v. Noce*, 398 S.C. 35, 726 S.E.2d 229 (Ct. App. 2012)(same); *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000)(motion to transfer venue); *Tillman v. Tillman*, 420 S.C. 246, 801 S.E.2d 757 (Ct. App. 2017)(granting motion to dismiss a counterclaim, but allowing the counterclaiming party the right to amend its pleading). As can be seen, none of those cases involved the same kind of order as

is present in this case. Certiorari should be granted in order for this Court to clarify the question of whether appeals must be taken from orders of the kind issued by the circuit court.

2. The Court of Appeals erred in dismissing this appeal, based on a conclusion that the issue on appeal pertained to class certification, rather than to the striking of defenses.

The Order of December 8, 2017, which dismissed this appeal, provided in its entirety as follows:

> Appellant has appealed the circuit court's orders certifying a class, finding the Plaintiffs have standing to represent the class, and denying reconsideration. After careful consideration, Respondents' motion to dismiss is granted because the underlying orders on appeal are not immediately appealable. *See Schein v. Lamar*, 214 S.C. 329, 263 S.E.2d 383 (1980); *Knowles v. Standard Savings and Loan Assoc*, 274 S.C. 58, 261 S.E.2d 49 (1979) (finding class certification orders are not immediately appealable). Remittitur will be sent as required by Rule 221(b), SCACR.

App. 12.

The Court of Appeals erred in holding that that the appeal involved the issue whether Plaintiffs "have standing to represent the class." DEW's contentions on appeal are not strictly related to class certification, but rather are that the dismissal of the defenses pertaining to standing, justiciability, mootness and mitigation of damages affected substantial rights and effectively struck those defenses. App. 24-26. As DEW noted in the Court of Appeals, App. 26, the circuit court in effect

affirmatively granted judgment for Plaintiffs on the issue of standing and by logical extension did the same for the defenses of justiciability, mootness and mitigation of damages. It is not as if the circuit court made a tentative conclusion that the two named Plaintiffs had standing for the limited purpose of going forward with class certification. The issue of standing and the related issues of justiciability, mootness and mitigation of damages were effectively decided by the circuit court once and for all in the orders from which this appeal was taken. Accordingly, those issues were subject to immediate appeal, and the Court of Appeals erred in concluding otherwise.

3. If the Court permits the appeal on standing and other defenses to proceed, it would be permissible and efficient to consider class certification as well.

DEW acknowledges that an order granting class certification is normally not immediately appealable. However, this rule has not been applied rigidly, and "an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the [c]ourt and a ruling on appeal will avoid unnecessary litigation." *Watson v. Underwood*, 407 S.C. 443, 459, 756 S.E.2d 155, 163 (Ct. App. 2014), quoting *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991), overruled on other grounds by *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995).

Among other things, DEW has contended that *Gardner v. South Carolina Dept. of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003), precludes class certification in this case. *Gardner* holds in pertinent part as follows:

> A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case. Requiring such individualized examination negates the benefits of a class action suit. See *O'Quinn v. Beach Associates*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (S.C.1978) ("The very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action.").

353 S.C. at 22, 577 S.E.2d at 201. In the present case, as noted above, each putative plaintiff's individual situation needs to be examined to see whether that person made the four non-online job searches that would entitle him or her to a benefit for any week when benefits were denied for failure to perform an online work search. As a result, the nature of these claims "requir[es] each member of the class to prove the elements of the cause of action," thereby making class certification inappropriate.

If this Court concludes that the issue of standing is appealable and affirms the circuit court's Order that the named Plaintiffs have standing, a decision on the correctness of the grant of class certification would make an enormous difference in the amount of time and effort that would need to be expended even if the Court were to conclude that the named Plaintiffs had standing. The reason for this is that

without class certification, this litigation would involve only the claims of the two named Plaintiffs and not an entire class.

CONCLUSION

For the foregoing reasons, DEW respectfully requests that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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February 28, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

Lorenda Robinson, Elaine Nix, Archie Patterson, and Tami Bollerman, ... Plaintiffs,

Of Whom, Archie Patterson and Tami Bollerman are ..... Respondents,

v.

South Carolina Department of Employment and Workforce, ... Appellant.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson, Wren & Plyler, P.A., attorneys for the Petitioners, does hereby certify that service of the **Petition for Writ of Certiorari** in the above referenced action was made upon the Clerk of the South Carolina Court of Appeals by hand delivery and upon all counsel of record as well as a copy of the **Appendix** being made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 28th day of February, 2018:

Hand Delivered
The Honorable Jenny Abbott Kitchings
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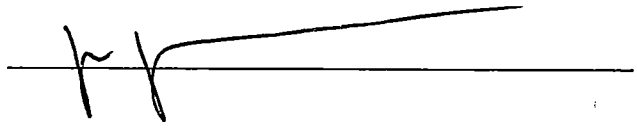

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February 28, 2018

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RE: Lorenda Robinson, Elaine Nix, Archie Patterson, Tami Bollerman, Fred Alexander and Pamela Wooten v. South Carolina Department of Employment and Workforce
Court of Appeals Tracking Number: 2017-001208
Civil Action Number: 2013-CP-06-0059
Our File Number: 79.9168

Dear Ms. Kitchings:

Please find enclosed for filing two (2) copies of the **Petition for Writ of Certiorari** and **Certificate of Service** in the above referenced matter that has been filed with the South Carolina Supreme Court. Please provide me with a clocked-in copy of each document by way of my courier.

Thank you for your assistance in this matter.

With highest regards, I am

Sincerely yours,

DAVIDSON, WREN & PLYLER, P.A.

/s/

Kenneth P. Woodington

KPW/mss
Enclosures

cc: (w/ Enclosures)

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