

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Richland County
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2018-000384

RECEIVED
MAR 09 2018
SC Court of Appeals

LeBrian Cleckley, on behalf of himself and others similarly situated,.....Respondent,

v.

South Carolina Electric & Gas Co. and the State of South Carolina,.....Defendants,

Of whom:

South Carolina Electric & Gas Co.....Appellant.

AND

Richard Lightsey,.....Respondent,

v.

South Carolina Electric & Gas Co.,.....Appellant.

AND

Jessica S. Cook,.....Respondent,

v.

South Carolina Public Service Authority (also known as Santee Cooper), South Carolina Electric & Gas Co., Palmetto Electric Cooperative, Inc., and Central Electric Power Cooperative, Inc.....Defendants,

Of whom:

South Carolina Electric & Gas Co.....Appellant.

AND

Edwina Goodman, et al. individually and on behalf of other similarly situated Plaintiffs,.....Respondents,

v.

SCANA Corp. & South Carolina Electric & Gas Co.....Appellants.

AND

Chris Kolbe and Ruther Ann Keffer, on behalf of themselves and all others similarly situated.....Respondents,

v.

South Carolina Public Service Authority, et al.....Defendants.

Of whom:

SCANA Corp. and South Carolina Electric & Gas Co.....Appellants.

Return of Appellants’ Petition for Rehearing of the Order Dismissing the Appeal

Appellants SCANA Corporation and South Carolina Electric & Gas Company petition this Court for rehearing of the March 7, 2018 Order dismissing their appeal as interlocutory, and thus not immediately appealable. Appellants’ petition fashions their arguments to suggest this Court should have engaged in an unnecessarily detailed inquiry of the causes of action and of the underlying facts to discern the effect of the appealed order and whether it abridges their right to a certain mode of trial or struck their affirmative defenses. Appellants assertions are misguided and unsupported by our jurisprudence. Accordingly, this Court properly dismissed the appeal and returned the matter to the trial court to proceed with litigation and reconsideration is unwarranted. *See* Rule 221, SCACR.

Argument

I. This Court properly dismissed the appeal of the trial court's order denying Appellants' Motion to Dismiss because the order is interlocutory and the merits need not be addressed.

Appellants entreat this Court to engage in an exhaustive review of the pleadings and the factual allegations therein to determine the effect of the trial court's order, emphasizing their argument that the denial of the motion to strike a jury demand offends their right to a certain mode of trial. Our jurisprudence to the contrary easily undermines Appellants' arguments.

Section 14-3-330 of the South Carolina Code of Laws sets forth which judgments and orders are appealable. The statute provides, in pertinent part:

The Supreme Court shall have appellate jurisdiction for correction of error 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.

§ 14-3-330(2). Accordingly, when a final judgment has not been rendered, as in this case, the Court considers whether the interlocutory order presents an exception to the general rule that only final judgments are appealable. Practically, an interlocutory order is not immediately appealable unless the ruling affects a substantial right. *Burkey v. Noce*, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012); *see also Ex parte Johnson*, 63 S.C. 205, 41 S.E. 308 (1901).

Because the denial of a Rule 12(b) motion is interlocutory and does not ultimately decide any issue, appellate courts generally decline to review that issue on appeal pursuant to § 14-3-330(2). *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 95, 529 S.E.2d 11, 14 (2000). It is well-settled that the denial of a motion to dismiss for either subject matter jurisdiction or failure to state a claim is not immediately appealable. *E.g. Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995); *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995), *overruled*

on other grounds by *Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002). Further, an order denying a motion to dismiss for venue is not immediately appealable. *Breland*, 339 S.C. at 95, 529 S.E.2d at 14.¹

Moreover, the *denial* of a motion to strike a jury demand pursuant to 12(f) is not immediately appealable. While Appellants contend this issue is appealable because it affects the mode of trial to which they have a right, our jurisprudence has established otherwise. The Supreme Court in *Fulmer v. Cain*, explained “the mode of trial exception to the general rule that only final orders are appealable is confined to orders which abridge a party’s constitutional right to trial by jury.” 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (internal citation omitted). Appellants have no constitutionally afforded inviolate right to a bench trial. To the contrary, there has been no abridgment because each case involves legal claims to which Respondents are entitled to a jury trial.² Accordingly, this issue is not properly before this Court.

¹ To the extent this Court reviews the underlying merits of Appellants’ 12(b) arguments, the trial court properly denied the motion to dismiss. Appellants directed the trial court, and now this Court, to examine the proper adjudicating body based on Respondents’ allegations pursuant to Rule 12(b)(1), SCRC. This inquiry is unwarranted. Respondents’ allegations are not claims which the Public Service Commission (PSC) could adjudicate or offer relief. Rather, subject matter jurisdiction over the legal and equitable claims rests exclusively in the circuit court. Similarly, the distinctions between Respondents’ cases and actions that may pend before the PSC demonstrate that Appellants are not entitled to relief under 12(b)(8), SCRC. Moreover, venue in Richland is proper, pursuant to 12(b)(3), SCRC, because it is the situs of the most substantial part of the alleged act or omission giving rise to this action. Finally, Respondents’ well-pled complaints adequately allege all causes of action involved and Appellants offer no argument undermining this conclusion.

² Appellants unnecessarily invite this Court to engage in an inquiry as to whether an action is legal or equitable in nature. Pet. for Reh’g 5. Under *Fulmer*, Appellants’ request is unwarranted. Despite this precedent and Respondents’ assertion of legal claims in the operative complaints, Appellants attempt to manufacture an immediately appealable issue by claiming the complaints sound in equity, and therefore subjecting them to a jury trial would deprive them of their right not to have one. Appellants’ bald assertion that Respondents’ complaints “seeks solely equitable relief” does not make that so. Respondents’ complaints include a number of legal claims for which they are entitled as a matter of law to a jury trial— including negligence, breach of contract, and breach of fiduciary duty. After a full hearing, the trial court expressly ruled that at this early stage,

II. The trial court's order does not rule upon Appellants' affirmative defenses, and thus this matter is not properly before this Court.

Appellants' contention that the trial court's order strikes their affirmative defenses is unpreserved and unsupported by a plain reading of the order. Appellants' thinly veiled attempt to have this Court reverse the trial court based on unsupported grounds must be rejected.

Initially, this issue is unpreserved for review. Nothing in the order purports to strike any affirmative defense and to the extent Appellants read it to do otherwise, they were required to address that concern to the trial court and obtain a ruling. Because Appellants failed to file a 59(e) motion to allow the trial court to consider this issue, it is not preserved for appellate review. *Elam*, 361 S.C. at 24, 602 S.E.2d at 780.

Furthermore, the language of the order belies Appellants' characterization that it strikes any defenses. Instead, the order specifically states that a motion to dismiss is simply not the vehicle for addressing affirmative defenses. Order Den. Def.'s Mot. 10 ("With regard to SCE&G's

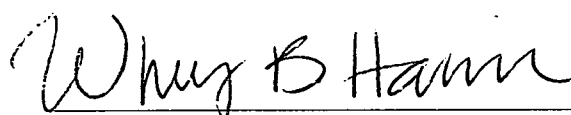
Respondents pled facts sufficient to survive a motion to dismiss as to these legal claims. Appellants' effort to recast this appeal as infringing their purported right to a non-jury trial is merely an attempt to have this Court prematurely rule on the merits of Respondents' legal claims—an interlocutory matter which is not immediately appealable under any theory. In addition, as the factual record is developed in this case, Appellants are still capable of asking the trial court to reexamine Respondents' pleadings, and address the mode of trial. Therefore, the order does not permanently deprive Appellants of anything, including a mode of trial to which they were otherwise entitled.

Moreover, any argument that Respondents' requested relief sounds entirely in equity is unpreserved for this Court's review. The order, from which Appellants now appeal does not address this issue. Instead, it denies Appellants' motion to strike finding the complaint alleges causes of action for negligence and breach of contract, which "are matters at law, properly decided by a jury." (Order Den. Def.'s Mot. 13). Absent from this holding is any consideration of whether the requested relief transforms these causes of actions into equitable claims. Because Appellants failed to file a 59(e) motion requesting the trial court rule on this argument, it is unpreserved for appellate review. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file [a 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."). Thus, even if this Court were intrigued by the argument that Respondents seeks solely equitable relief, it should dismiss the appeal based on preservation.

contention that [Respondents'] claims are barred by the economic loss rule, voluntary payment doctrine, and the doctrines of res judicata and collateral estoppel, none of these doctrines are appropriate to support a dismissal.”); *see generally, Brown v. Cnty. of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005) (explaining the denial of a motion to dismiss in which a party asserted an affirmative defense does not preclude the party from raising the issues presented in the motion at a later point in the case). To the extent Appellants dislike the trial court’s analysis, it was their choice to raise those issues prematurely. This failed strategic decision should not allow them to appeal arguments that should never have been raised in the first instance. In sum, the very nature of this discussion illustrates the interlocutory nature of the issues now raised before this Court. *Mid-State Distrib., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334–35, 426 S.E.2d 777, 780 (1993) (noting the party had “not arrived at the end of the road . . . a party who is denied a dismissal under Rule 12 has forfeited nothing, they must simply continue to trial”).

Conclusion

For these reasons, Appellants’ petition for rehearing should be denied.



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March 9, 2018

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v.

SCANA Corp. & South Carolina Electric & Gas Co.....Appellants.

AND

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v.

South Carolina Public Service Authority, et al.....Defendants.

Of whom:

SCANA Corp. and South Carolina Electric & Gas Co.....Appellants.

Proof of Service

The undersigned hereby certifies that on March 9, 2018, she served counsel for Appellants with *Respondents' Return to Appellants' Motion to Dismiss* by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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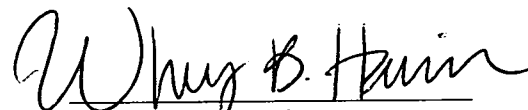
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March 9, 2018

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SC Court of Appeals

Re: Appellate Case No. 2018-000384

Cleckley v. SCE&G et. al., Case No. 2017-CP-40-04833;
Lightsey v. SCE&G., Case No. 2017-CP-25- 0335;
Goodman, et al. v. SCANA Corp. & SCE&G., Case No. 2017-CP-20-0300;
Cook v. South Carolina Public Service Authority, et al., Case No. 2017-CP-25-00348;
Kolbe, et al. v. South Carolina Public Service Authority, et al., Case No. 2017-CP-08-2099.

Dear Ms. Kitchings:

Enclosed please find Respondents' Return to Appellants' Petition for Rehearing in the above captioned matter, along with the proof of service. Please return a clocked copy of the Return to my courier. If you have any questions or concerns, do not hesitate to contact me.

With kind regards, I am

Whitney B. Harrison

Enclosure

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March 9, 2018
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