

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPEAL FROM HAMPTON COUNTY
APPEAL FROM FAIRFIELD COUNTY
APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

RECEIVED
MAR 16 2018
SC Court of Appeals

C.A. No.: 2017-CP-40-4833
C.A. No.: 2017-CP-25-0335
C.A. No.: 2017-CP-25-0348
C.A. No.: 2017-CP-20-0300
C.A. No.: 2017-CP-08-2009
Appellate Case No. 2018-000384

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

v.

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

Of whom:

South Carolina Electric & Gas Company isAppellant.

AND

Richard Lightsey,.....Respondent,

v.

South Carolina Electric & Gas Company, Defendant.

Of whom:

South Carolina Electric & Gas Company isAppellant.

AND

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

v.

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

Of Whom:

South Carolina Electric & Gas Company isAppellant.

AND

Edwinda Goodman, Bobby Lee Jones, Bobby Cunningham, Daryl Davis, Phillip Cooper, Karla Cooper, Jackie Mincey, Dean M. Perry, Steve Lawson, Freddie Lawson individually and on behalf of other similarly situated Plaintiffs,..... Respondents,

v.

SCANA Corporation and South Carolina Electric & Gas Company, Defendants.

Of whom:

SCANA Corporation and South Carolina Electric & Gas Company are.....Appellants.

AND

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

v.

South Carolina Public Service Authority, an Agency of the State of South Carolina; W. Leighton Lord, III, in his capacity as chairman and director of the South Carolina Public Service Authority; William A. Finn, in his capacity as director of the South Carolina Public Service Authority; Barry Wynn, in his capacity as director of the South Carolina Public Service Authority; Kristofer Clark, in his capacity as director of the South Carolina Public Service Authority; Merrell W. Floyd, in his capacity as director of the South Carolina Public Service Authority, Calhoun Land, IV, in his capacity as director of the South Carolina Public Service Authority; Stephen H. Mudge, in his capacity as director of the South Carolina Public Service Authority; Peggy H. Pinnell, in her capacity as director of the South Carolina Public Service Authority; Dan J. Ray, in his capacity as director of the South Carolina Public Service Authority; David F. Singleton, in his capacity as director of the South Carolina Public Service Authority; Jack F. Wolfe, in his capacity as director of the South Carolina Public Service Authority; South Carolina Electric & Gas Company; and SCANA Corporation,..... Defendants.

Of Whom:

South Carolina Electric & Gas Company and SCANA Corporation are.....Appellants.

**SOUTH CAROLINA ELECTRIC AND GAS COMPANY'S AND SCANA
CORPORATION'S REPLY IN FURTHER SUPPORT OF THEIR
PETITION FOR REHEARING**

Pursuant to Rules 221 and 240(f), SCACR, Appellants South Carolina Electric & Gas Company and SCANA Corporation (collectively, "SCE&G") submit this reply memorandum in further support of their Petition for Rehearing of the order mailed in this case on March 7, 2018, and received by the undersigned on March 8, 2018 (the "Order") and in specific response to the Return to SCE&G's Petition for Rehearing filed by the Respondents on March 9, 2018 (the "Return"). As described further below, Respondents fail to address SCE&G's overarching arguments, and their analysis on key points is flawed. This Court should grant SCE&G's Petition for Rehearing.

ADDITIONAL ARGUMENT FOR REHEARING

I. Respondents entirely ignore SCE&G's overarching arguments.

At its core, SCE&G's Petition for Rehearing addresses the Court's obligation to analyze the "effect of the interlocutory order to determine its appealability" "on a case-by-case basis." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011); *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 733 S.E.2d 144, 146 (2015). Respondents offer no rebuttal or argument in response to this bedrock principle of appellate law. Instead, Respondents simply cite the *general* standard that, as a *general* matter, denials of Rule 12(b) motions are not immediately appealable, Return p. 3, a *general* standard with which SCE&G agrees. But that simple characterization overlooks the plain language and

scope of the Orders here,¹ ignores applicable law, and is thus of no utility in analyzing the actual effect of these Orders. Respondents offer no argument whatsoever that the Court should not undertake a thorough, analytical, and rigorous review of these Orders as they were entered and the effect that they have on the claims and defenses raised in these cases. And any thorough, analytical, and rigorous review of these Orders reveals that they are appealable under applicable South Carolina law construing S.C. Code Ann. § 14-3-330.

II. The “substantial right” at issue in a mode of trial appealability analysis is not limited to the right to a jury trial.

Respondents argue that the mode of trial analysis and right to appeal under S.C. Code Ann. § 14-3-330(2) are confined to orders that refuse to allow a jury trial when one is allowed as a matter of right. Return, p. 4. Respondents misread the applicable law. Respondents rely solely on *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008). However, the portion of *Fulmer* addressing this issue was dicta and quoted from a dissenting opinion that has not been elevated to applicable precedent. The issue in *Fulmer* was whether an order transferring a case from probate court to circuit court was immediately appealable under S.C. Code Ann. § 14-3-330(2) “inasmuch as it denied Cain a mode of trial to which she was entitled” for causes of action raised in the probate court for setting aside a codicil, fraud, tortious interference with contract, and tortious interference with inheritance rights. *Fulmer*, 380 S.C. at 468-69, 670 S.E.2d at 653-54. The Supreme Court disagreed that the transfer order denied Cain a mode of trial to which she was entitled for the simple fact that jury trials are available in both the probate court and the circuit court and there was thus “no abridgement of Cain’s right to a jury trial” by denying Cain’s motion to transfer from the probate court to the circuit court. *Id.* at 470, 670 S.E.2d at

¹ Respondents also incorrectly describe the Orders as orders on 12(b) motions (Return p. 3), but SCE&G’s underlying motions and the Orders themselves also include grounds raised under Rule 12(f).

654. Her jury trial right remained intact no matter what court heard her claims. In dicta, the *Fulmer* opinion stated that a dissenting opinion in *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E. 2d 81 (2008) “noted” that “‘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.” *Fulmer*, 380 S.C. at 470, 670 S.E.2d at 654. Nowhere does *Fulmer* indicate that the position articulated in the *Salmonsens* dissent has become state law in any way or that the majority opinion in *Salmonsens* has been overruled.

In contrast, the majority opinion in *Salmonsens* cited *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) for the proposition that the “traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case, *or is erroneously required to proceed before a jury in an equity case.*” *Salmonsens*, 377 S.C. at 453, 661 S.E.2d at 87 (emphasis added). There is no indication that either *Salmonsens* or *Flagstar* has been overruled or abrogated on this issue. Thus, a fundamental right on a mode of trial issue is implicated when, like here, a litigant is required to proceed before a jury on an equitable claim. And under South Carolina law, SCE&G *must* raise this issue “at the first opportunity” (which it did) and *must* appeal a denial of its motion “immediately” (which it also did). *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993); *Frampton v. S.C. Dept. of Transp.*, 406 S.C. 377, 385, 752 S.E.2d 269, 274 (Ct. App. 2013).

III. The Orders clearly and unequivocally strike portions of SCE&G’s pleading and affirmative defenses, and no Rule 59(e) motion was required to preserve these issues.

Respondents claim that SCE&G was required to file a motion under Rule 59(e), SCRCPP, to preserve its arguments that the Orders struck its affirmative defenses. Not so. The Orders are

clear and unequivocal and ruled on all of the issues that SCE&G raised. These issues are thus preserved. *See Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). SCE&G raised the issue that, no matter what Respondents may call them, the fundamental character and main purpose of *all* of Respondents' claims is for equitable relief, i.e., a refund of electric rates previously approved by the South Carolina Public Service Commission ("PSC"), and that, consequently, such relief is barred in the circuit court by the filed rate doctrine and other defenses. The Orders held, *inter alia*, as follows with regard to this issue (all emphases added):

- "In the instant case, the Court is not being asked to determine whether rates collected pursuant to the Base Load Review Act ('BLRA') were or are reasonable. ... The amounts of the rate charged to consumers by SCE&G is not the issue. Instead, this complaint seeks to address whether funds collected by SCE&G, pursuant to the PSC approved rates, should be recouped by the ratepayers based on alleged principles of law and equity. The filed rate doctrine is thus no bar to the relief Plaintiff has requested under the causes of action set forth in the First Amended Complaint." Orders, p. 4.
- "As stated above, this action does not challenge the ratemaking process. Rather, it alleges that consumers were charged rates for a benefit that SCE&G failed to deliver." Orders, p. 4.
- "This action also involves claims concerning a guaranty payment and who the proper recipient of that payment should have been, as well as whose rights were negotiated and by what authority. These claims are likewise not precluded by the filed rate doctrine." Orders, p. 4.
- "In the instant case, Plaintiff is not, as observed above, attacking the legality or reasonableness of the rate." Orders, p. 5.
- "Here, Plaintiff does not seek relief from rates, but rather seeks relief based on Plaintiff's claims that the Plaintiff class has been financing the construction of a project, which SCE&G has voluntarily elected to abandon, and for which SCE&G has been paid considerable sums by a third party related to the abandonment." Orders, p. 6.
- "Plaintiff's claims do not seek to invade the ratemaking authority of the PSC. As such, SCE&G's motion to bar Plaintiff's claims, based on the filed rate doctrine, is denied." Orders, p. 7.

- “Plaintiff’s claims do not arise out of the PSC’s limited jurisdiction to regulate rates.” Orders, p. 7.
- “Plaintiff’s claims do not ask the Court to decide an issue, case, or controversy which has been or could have been determined by the PSC.” Orders, p. 8.
- “The relief Plaintiff seeks is not predicated on the rates approved and charged by SCE&G, but rather the relief sought is based on principles of law and equity.” Orders, p. 8.²

SCE&G received a ruling effectively, and often explicitly, striking its affirmative defense of the filed rate doctrine at least nine times in the Orders. It cannot be seriously contended that a Rule 59(e) motion was necessary to procure a further ruling from the trial court on whether the filed rate doctrine could ever apply in this case. The same holds true for other affirmative defenses raised by SCE&G and affirmatively ruled on by the trial court, such as res judicata, collateral estoppel, failure to exhaust administrative remedies before the PSC, and Rule 12(b)(8) (all emphases added):

- “SCE&G cannot establish [res judicata] because none of the elements are satisfied here.” Orders, p. 11.
- “In the present case, collateral estoppel cannot apply because the issues raised in this litigation have never been decided before.” Orders, p. 11.
- “SCE&G cannot make any of the showings necessary for dismissal pursuant to SCRCP 12(b)(8), nor does the existence of other proceedings require this Court to delay any proceeding pursuant to the primary jurisdiction doctrine, which has no application in this case.” Orders, pp. 11-12.
- “The relief sought by Plaintiff is not available through the PSC, or any other administrative channel. And Plaintiff’s claims are separate and distinct from those matters currently pending before the PSC.” Orders, p. 13.

² Respondents also argue that a Rule 59(e) motion was required to preserve “any argument that Respondents’ requested relief sounds entirely in equity.” Return p. 5, n. 2. The quotes from the Orders above plainly contradict the Respondents, as the trial court clearly and unequivocally held that Respondents’ claims sounded in both law and equity—not purely equitable claims (as argued by SCE&G) based on Respondents’ contention that SCE&G should not be able to charge certain rates for electricity service to Respondents and should be required to disgorge funds based on certain rates charged in the past.

By their plain language, the Orders go *far* beyond simply finding that Respondents have advanced allegations sufficient for the litigation to proceed to discovery.³ Instead, the Orders fully analyze the filed rate doctrine, res judicata, collateral estoppel, primary jurisdiction, and other affirmative defenses and affirmatively, conclusively, and finally determine that they do not and cannot apply in this litigation. The Orders decide the applicability of these critical affirmative defenses that act as a *complete bar* to Respondents' claims, whether they are considered legal or equitable. These affirmative defenses have, for all practical purposes, been stricken from this entire case.⁴

Conclusion

For the reasons set forth above and in SCE&G's Petition for Rehearing, SCE&G respectfully submits that the Court overlooked or misapprehended the nature of the Orders on appeal. SCE&G's Petition for Rehearing should thus be granted pursuant to Rule 221(a), SCACR, and these appeals should continue before this Court in the normal course.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

³ There are some statements in the Orders that attempt to distinguish cases on which SCE&G relied because they were decided at the summary judgment stage instead of at the motion to dismiss stage. *See, e.g.* Orders pp. 5 ("*Lifschultz* is an opinion ruling on a motion for summary judgment, not a motion on the pleadings ..."); 6 ("*Medco* involves an appeal from a grant of summary judgment, and not an appeal from a ruling on pleadings ..."). There are also instances in the Orders when the trial court recites that the application of affirmative defenses is *usually* resolved at later stages of the litigation. Orders p. 10. These general assertions do not impact the actual *effect* of the above-quoted holdings of the trial court on the merits of the Respondents' claims and SCE&G's affirmative defenses, nor does it insulate the Orders from appealability based on these effects. *See Collins v. Sigmon*, 299 S.C. 464, 467, 385 S.E.2d 835, 836 (1989).

⁴ Contrary to Respondents' suggestion, there is nothing premature whatsoever in raising affirmative defenses in a motion brought under Rule 12, SCRCPP or in an answer to a complaint. In fact, affirmative defenses *must* be raised early in the litigation or they are barred. Rules 8(c), 12(b), SCRCPP.

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PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have caused the foregoing to be served via U.S. mail, postage prepaid, *or by other delivery as indicated*, to all parties of record at the addresses shown below.

1. **South Carolina Electric and Gas Company's and SCANA Corporation's Reply in Further Support of Their Petition for Rehearing**

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March 16, 2018
Columbia, South Carolina

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March 16, 2018

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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SC Court of Appeals

Re: *LeBrian Cleckley v. South Carolina Electric and Gas Company, et al.*
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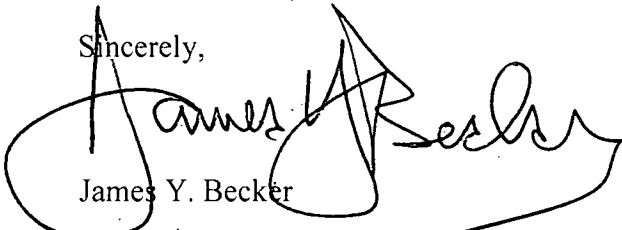
Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven copies of the following for filing in regards to the above referenced matter:

- (1) South Carolina Electric and Gas Company's and SCANA Corporation's Reply in Further Support of Their Petition for Rehearing; and
- (2) Proof of Service;

Please return the extra copy via our courier.

Sincerely,



James Y. Becker

JYB/rhb
Enclosures

cc: All Counsel of Record