THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2018-CP-10-2764

Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated .... Respondent,

v.

The Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks, ... Appellant.

RETURN TO RESPONDENT'S MOTION TO DISMISS

Pursuant to South Carolina Appellate Court Rules 201, 210, and 241 Appellant The Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks ("MPW") files this Return to Respondent Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated's ("Snee Farm") Motion to Dismiss ("Motion"). The Motion contends that the MPW's appeal should be dismissed because the Orders from which MPW appeals are interlocutory and not immediately appealable. As demonstrated below, Respondent's Motion should be denied because MPW's appeal is proper under South Carolina law.

I. BACKGROUND

Snee Farm has filed suit against MPW seeking a refund for alleged excessive Basic Facility Charges ("BFC") that were charged by MPW to its commercial customers in MPW's service area and a reduction in Residential Equivalent Units ("REU") allocation for commercial customers. MPW is a municipal water and sewer authority that is established pursuant to ordinance of the Town of Mount Pleasant, South Carolina and South Carolina state law and that provides water and wastewater services to businesses and residents in Mount Pleasant, South Carolina. Further, MPW is a local governing body and/or a governmental entity under South Carolina law. Per Section 5-31-670 of the South Carolina Code of Laws, MPW "may . . . furnish water to persons for reasonable compensation and charge a minimum and reasonable sewerage charge for maintenance or construction of such sewerage system within such city or town or special service district."

The Complaint filed against MPW includes the following causes of action: 1) declaratory judgment; 2) breach of contract; 3) conversion; 4) unjust enrichment/money had and received; and 5) constructive trust. In response, MPW filed an answer responding to the allegations of the Complaint and including several affirmative defenses, including asserting that Snee Farm lacks standing to bring suit against MPW and that Snee Farms lacks damages that can be assessed under South Carolina law.[1]

Snee Farm filed a Motion for Class Certification ("Motion") and defined the class as follows:

> All current and former MPW customers who paid excessive BFC, defined as a customer's average daily usage from January 1, 2014 (or any later

[1] Originally MPW filed a motion to dismiss. On November 30, 2018, Judge McCoy denied the motion by issuing a Form 4 order.

> date of service inception) to present being less than that customer's assigned REU.[2]

Among other things, Snee Farm contended that its claims were typical of the Class and that it "is an MPW customer that paid excessive BFC charges." Further, Snee Farm contended that it has suffered damages that exceed one hundred dollars. MPW opposed Snee Farm's Motion because, among other things, Snee Farm lacked standing to sue MPW. Specifically, MPW argued that because Snee Farm collects 100% of the entire amount due on its water bill from its owners, Snee Farm has not actually suffered any damages. Further, MPW explained that Snee Farm did not receive an assignment of any claims against MPW from the individual unit owners and the board voted to bring the instant lawsuit without notifying the owners or allowing them to vote.

The circuit court issued its Order granting Snee Farm's Motion on June 14, 2019. The Order made certain findings including that Snee Farm "is the MPW customer, not the individual owners in the Snee Farm Lakes development." Order, p. 2. The circuit court also defined the class as follows:

> [A]ll current and former MPW commercial customers ***who paid excessive BFC in excess of $100***, defined as a customer's average daily usage from January 1, 2014 (or any later date of service inception) to present being less than that customer's assigned REU. Excluded from the Class are:
>
> a. Defendant, its legal representatives, elected officials, officers, directors, assigns, and successors;
>
> b. The judge, magistrate, and any special master to whom this case is assigned, and any member of their immediate families; and
>
> c. To the extent the class certification order permits exclusion, all account holders that timely submit proper requests for exclusion from the plaintiff class.

[2] The class was initially defined in the Complaint as: "All current and former MPW commercial customers who paid BFC but whose metered water and wastewater usage in any month was less than that customer's number of assigned REUs."

Order, p. 5 (emphasis added). The circuit court found that Snee Farm had standing to bring suit against MPW despite the fact Snee Farm did not make any payments itself to MPW. The circuit court further determined that "[t]he individual unit owners in the Snee Farms Lake development, however, are *not* MPW customers, have no direct relationship with MPW, and therefore have no standing to bring this case." Order, p. 6. In the alternative, the circuit court also determined that Snee Farm "would have associational standing to bring suit for its member owners." *Id.*, n. 3.

MPW filed a Motion Pursuant to South Carolina Rules of Civil Procedure 59(e) and 60 contending the circuit court erred by ignoring or failing to consider certain facts related to the Plaintiff's standing, among other things. The circuit court denied this motion, and this appeal follows.

II. ARGUMENT

The South Carolina Supreme Court has explained that "[t]he right of appeal arises from and is controlled by statutory law." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). Section 14-3-330 of the South Carolina Code of Law provides that an appeal may be had of "[a]n order affecting a substantial right made in an action when such order (a) in effect determines the action . . . ." "'An order 'involves the merits,' as that term is used in [s]ection 14-3-330(1)[,] and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense.[']" *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) (quoting *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2008)). South Carolina appellate courts "may review an interlocutory order when, as now, it contains other appealable issues." *Ferguson v. Charleston Lincoln/Mercury*, 344 S.C. 502, 509, 544 S.E.2d 285, 289 (Ct. App. 2001) (citing *Pruit v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998); *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991) ("An order that is not directly appealable will nonetheless

be considered if there is an appealable issue before the Court and *a ruling on appeal will avoid unnecessary litigation.*" (emphasis added by the Court), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995)).

Here, the circuit court's Order finally determines a substantial matter forming the whole of MPW's defense that Snee Farms lacks standing to bring the lawsuit.[3] Under South Carolina law, "standing is a fundamental prerequisite for instituting a legal action . . . ." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014). *See also Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 528, 745 S.E.2d 385, 392 (Ct. App. 2013) (explaining "'[s]tanding to sue is a fundamental requirement in instituting an action.'") (quoting *Bodman v. State of S.C.*, 403 S.C. 60, 742 S.E.2d 363 (2013); *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999)). This Court has the authority to review the circuit court's determination of standing.

This Court exercised this authority in *Ferguson v. Charleston Lincoln/Mercury*, 344 S.C 502, 544 S.E.2d 285 (Ct. App. 2001), affirmed at 349 S.C. 558, 564 S.E.2d 94 (2002). In *Ferguson*, the decedent sued the car dealership for allegedly engaging in unfair or deceptive trade practices in connection with the decedent's purchase of a vehicle. *Ferguson*, 344 S.C. at 504, 544 S.E.2d at 286. After the decedent died, his wife continued prosecution of the lawsuit and sought class certification. *Id.* at 504, 544 S.E.2d at 286. The trial court granted the car dealership's motion for summary judgment and ruled the request for class certification was moot. *Id.*, 544 S.E.2d at 286.

This Court considered the wife's contention that the trial court improperly denied class certification. In considering this contention, the Court explained that while "[u]sually, an order

[3] Notably, Snee Farm's Motion does not even address MPW's arguments regarding Snee Farm's lack of standing.

denying class certification is interlocutory and not immediately appealable," there did exist certain circumstances where such an interlocutory order could be reviewed. *Id.* at 509, 544 S.E.2d at 289. In rendering its decision, the Court emphasized that an interlocutory order could be considered if there is an appealable issue and "'*a ruling on appeal will avoid unnecessary litigation*.'" *Id.* at 509-510, 544 S.E.2d at 289 (emphasis added by Court). The Court explained that "[t]he proponent of class certification must prove each prerequisite of certification." *Id.*, 544 S.E.2d at 289 (citing *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 (1990)). Further, the Court explained that "'[t]he failure of the proponents to satisfy any one of the prerequisites is fatal to class certification.'" *Id.*, 544 S.E.2d at 289. After considering the necessary prerequisites, the Court determined they were not met. *See Ferguson II*, 349 S.C. at 565, 564 S.E.2d at 98 (holding that the named plaintiff did not adequately represent the class on appeal).

In this case, the circuit court has made a final determination regarding whether Snee Farm has standing to bring this lawsuit by finding that it falls within the definition of the class, which includes current and former MPW commercial customers that have actually paid excessive BFC in excess of $100.[4] This finding involves the merits in that it allows the court to have jurisdiction over a case where the party bringing suit lacks standing and where it does not fall within the definition of the class. Under South Carolina law, MPW should be allowed to have this erroneous finding reviewed by this Court, and this Court has the authority to complete

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[4] The circuit court's finding robs MPW of its ability to present defenses to Snee Farm's causes of action against MPW. For example, in connection with Snee Farm's cause of action for declaratory judgment, it contends that it "and the plaintiff class are MPW commercial customers that for years unwittingly paid excessive BFC because their assigned REU accounted for more than their actual average monthly usage." The circuit court makes a finding that Snee Farm did make such payments despite the undisputed evidence to the contrary. This finding has a major impact on MPW's ability to defend itself in this case.

such a review. Therefore, Snee Farm's Motion to Dismiss should be denied because this Court has the authority to consider this appeal to avoid unnecessary litigation in a case where there is no jurisdiction. *See BLH v. S.C. Dep't of Soc. Servs.*, 423 S.C. 422, 431, 814 S.E.2d 638, 643 (Ct. App. 2018) (reversing grant of class certification). *See also Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008) (allowing review of the circuit court's decision regarding the method of determining the members of the class).

III. CONCLUSION

South Carolina law clearly provides this Court with an avenue to consider the appeal of the circuit court's Order. Therefore, for the foregoing reasons, Snee Farm's Motion to Dismiss must be denied.

September 26, 2019

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APPEAL FROM CHARLESTON COUNTY
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individually and on behalf of those similarly situated..Respondent

v.

The Commissioners of Public Works for the
Town of Mount Pleasant d/b/a Mount Pleasant Waterworks, ...Appellant

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PROOF OF SERVICE

I, the undersigned employee of Gallivan, White & Boyd, P.A., do hereby certify that I have caused the below referenced to be served via U.S. mail, postage prepaid, *or by other delivery as indicated*, to all parties of record at the address(es) shown below.

1. Return to Respondent's Motion to Dismiss and
2. Proof of Service of the Appellant's Return to Respondent's Motion to Dismiss on Respondent.

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September 26, 2019

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September 26, 2019

RECEIVED
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VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
SC Court of Appeals
1015 Sumter Street
Columbia, SC 29211

RE: Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated v. The Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks
Charleston County Case No.: 2018-CP-10-02764
GWB File No.: 8117-16

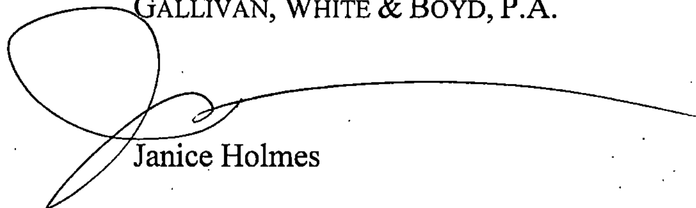
Dear Ms. Kitchings:

Enclosed for filing please find the original and six (6) copies of Appellant's Return to Respondent's Motion to Dismiss in regards to the above-referenced matter. I would appreciate you returning clocked copies to me via our courier. Thank you for your assistance with this matter.

With kind regards, I am

Sincerely,

GALLIVAN, WHITE & BOYD, P.A.



Janice Holmes

JH:amo
Enclosures
Cc: All Counsel of Record (via email only)