

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Dec 14 2020

S.C. SUPREME COURT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appellate Case No.: 2020-001496
Civil Action No. 2017-CP-40-06621

R. WAYNE TODD, derivatively on behalf of SCANA CORPORATION,

Plaintiff,

v.

KEVIN MARSH, GREGORY ALIFF, JAMES BENNETT, JOHN CECIL, SHARON DECKER,
MAYBANK HAGOOD, LYNNE MILLER, JAMES ROQUEMORE, MACEO SLOAN,
ALFREDO TRUJILLO, JIMMY ADDISON, and STEVE BYRNE,

Defendants,

And

SCANA CORP.,

Nominal Defendant.

TERESA PARLER, derivatively on behalf of SCANA CORPORATION,

Plaintiff,

v.

KEVIN MARSH, GREGORY ALIFF, JAMES BENNETT, JOHN CECIL, SHARON DECKER,
MAYBANK HAGOOD, LYNN MILLER, JAMES ROQUEMORE, MACEO SLOAN,
ALFREDO TRUJILLO, JIMMY ADDISON, and STEVE BYRNE,

Defendants,

And

SCANA CORP.,

Nominal Defendant,

Of Which SCANA CORPORATION, KEVIN MARSH, GREGORY ALIFF, JAMES BENNETT, JOHN CECIL, SHARON DECKER, MAYBANK HAGOOD, LYNN MILLER, JAMES ROQUEMORE, MACEO SLOAN, ALFREDO TRUJILLO, JIMMY ADDISON, and STEVE BYRNE are *Petitioners*,

And TERESA PARLER, derivatively on behalf of SCANA CORPORATION is the *Respondent*

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QUESTION PRESENTED

Did the Court of Appeals appropriately dismiss Petitioners’ appeal of the denial of a motion for judgment on the pleadings for a lack of appellate jurisdiction under S.C. Code Ann. § 14-3-330?

COUNTERSTATEMENT OF THE CASE

This case is a derivative action filed against the officers and board of directors (“Board”) of SCANA Corporation (“SCANA” or the “Company”) in the aftermath of the 2017 collapse of the V.C. Summer nuclear project. On July 31, 2017, SCANA announced that the multi-billion dollar project would be abandoned. (Appx. 167) On September 29, 2017, the first derivative complaint pertaining to this matter was filed seeking to hold Petitioners accountable for the failed nuclear project. See Crangle v. Marsh, et al., 2017-CP-40-5791 (Richland County).

On January 2, 2018—just three months after the commencement of the derivative litigation—Petitioners announced the negotiated terms of a proposed “agreement and plan of merger” with Dominion Energy, Inc. (“Dominion”) in which each share of SCANA stock would be converted into 0.669 shares of Dominion stock. (Appx. 79) The merger plan also included a lengthy indemnification provision designed to protect the SCANA Board from (among other things) the following:

any and all costs and expenses (including reasonable attorneys’ fees), judgments, fines, losses, claims, damages and liabilities (collectively, “Costs”) incurred in connection with any Proceeding or investigation, whether civil, criminal, administrative or investigative, arising out of or pertaining to matters existing or occurring at or prior to the Effective Time, including the transactions contemplated by this agreement.

(Appx. 120)

This merger was finalized on January 1, 2019. (Appx. 72) Six days later, Petitioners filed a motion for judgment on the pleadings pursuant to Rule 12(c), SCRPC. (App. 57) According to

Petitioners' memorandum in support of the motion, "by virtue of the Merger with Dominion, the nominal Plaintiffs in this action no longer own SCANA stock and consequently have no standing to prosecute the derivative claims on SCANA's behalf." (Appx. 69) Five weeks later, on February 14, 2019, two of the Petitioners—James A. Bennett and D. Maybank Hagood—were elected to the Dominion Board of Directors. See <https://news.dominionenergy.com/2019-02-14-Dominion-Energy-Adds-Two-New-Directors> (last visited December 12, 2020).

The trial court heard oral argument on the motion for judgment on the pleadings on November 14, 2019. Of particular concern to the court was the practical effect of a strict application of the "continuous ownership rule" set forth in Johnson v. Baldwin, 221 S.C. 141, 69 S.E.2d 585 (1952) in light of the potentially self-serving nature of the SCANA-Dominion merger successfully pursued by Petitioners. The trial court distinguished Johnson v. Baldwin by noting, unlike Respondent-Plaintiff Teresa Parler, "the plaintiff in Johnson made an affirmative act to divest himself of his shares in the corporation before the merger." (App. 10) The trial court determined that South Carolina law would recognize a "modified continuous ownership rule" similar to those recognized in North Carolina and other states where "if the plaintiff objects to the merger, but maintains stock ownership, even as stock is converted into shares in the new merged corporation, the plaintiff can maintain his derivative suit." (App. 10) Holding otherwise, the trial court reasoned, would permit a merger to "be used by egregiously offending officers and directors as a factually blind get-out-of-jail-free card to automatically avoid accountability for their actions." (App. at 7) Having so ruled, the trial court granted Parler's motion to intervene, denied Petitioners' motion for judgment on the pleadings, and ordered that "the case proceed with discovery." (App. 13)

As this case has wound through the appellate courts, two Petitioners—Kevin Marsh and Stephen Byrne—have pleaded guilty to federal charges alleging a conspiracy to commit mail and wire fraud in connection with the failed nuclear project.¹ A federal information filed by the United States Attorney contains the following allegations:

The defendant, STEPHEN ANDREW BYRNE, along with others known and unknown to the United States Attorney, consisting of former SCANA Corporation (“SCANA”) executives, employees, and the lawyers who advised them, led a failed effort to construct two nuclear power generators in Fairfield County, South Carolina. As construction problems mounted, costs rose, and schedules slipped, the defendant, STEPHEN ANDREW BYRNE, and others, hid the true state of the project. Through intentional and material misrepresentations and omissions, the defendant, STEPHEN ANDREW BYRNE, deceived regulators and customers in order to maintain financing for the project and to financially benefit SCANA. The members of the conspiracy’s actions and the associated cover-up allowed the project to continue until the contractor went bankrupt and the project was abandoned, resulting in billions of dollars of loss.

U.S.A. v. Byrne, 3:20-cr-00335-MGL (D.S.C.) at Dkt. 4. The allegations set forth within the Marsh information are substantially similar. U.S.A. v. Byrne, 3:20-cr-00335-MGL (D.S.C.) at Dkt. 1.

ARGUMENT

This Court has previously held “the denial of a motion for judgment on the pleadings is not directly appealable under S.C. Code Ann. § 14–3–330 (1976), even if it raises only a question of law.” Rose v. Thrash, 291 S.C. 459, 459, 354 S.E.2d 378, 378 (1987). Despite this authority, Petitioners insist the Court of Appeals erred in dismissing their appeal because it “overlooked the compelling reasons why the nature and effect of the order make it immediately appealable.”

¹ See U.S.A. v. Marsh, 3:20-cr-00727-MGL (D.S.C.); U.S.A. v. Byrne, 3:20-cr-00335-MGL (D.S.C.).

(Petition at 4) An examination of the substance of the trial court’s order, however, reveals that the dismissal of Petitioner’s appeal was appropriate.

I. The Court of Appeals did not ignore the substance of the trial court’s order

Petitioners insist that the Court of Appeals “ignored this Court’s precedent and dismissed the appeal based solely on the label assigned to the trial court’s order.” (Petition at 10) The Court of Appeals did no such thing. While the lower court’s orders dismissing the appeal and denying rehearing did not speak to Petitioners’ specific arguments, the arguments were fully briefed by Petitioners in their initial brief (Appx. 290), return to the motion to dismiss (Appx. 337), petition for rehearing (Appx. 348), Respondent’s return to the petition for rehearing, (Appx. 373), and Petitioner’s reply in support of rehearing (Appx. 455). Clearly, the lower court disagreed with Petitioner’s arguments. But Petitioner’s assumption that the Court of Appeals declined to consider the substance of the trial court’s order is without support in the record.

II. The trial court’s order, both in form and substance, is not immediately appealable

Petitioners insist that “[t]he order is immediately appealable because it ‘involv[es] the merits,’ S.C. Code § 14-3-330(1), and ‘affect[s] a substantial right,’ § 14-3-330(2).” Because neither is the case, this appeal should be dismissed.

“An order involves the merits when it ‘finally determin[e]s some substantial matter forming the whole or a part of some cause of action or defense” Tillman v. Tillman, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017), citing Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993).

If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory. If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment.

Mid-State Distributors, Inc. at 335, 426 S.E.2d at 780. In the trial court’s order now on appeal, the court denied Petitioners’ motion for judgment on the pleadings and ordered that “the case proceed with discovery.” (App. 12) Thus questions of fact remain open, final judgment has not been issued on any issue (much less the case itself), and the order is not appealable under S.C. Code § 14-3-330(1).

An order affecting a substantial right “is when such order would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.” Mid-State Distributors, Inc. at 335, n.4, 426 S.E.2d at 780, citing Shields v. Martin Marietta Corp., 303 S.C. 469, 402 S.E.2d 482 (1991). In this case, the order on appeal does not implicate any of the instances referenced in Mid-State Distributors, Inc. Rather, the trial court merely ordered the case proceed to discovery. All defenses remain available to Petitioners once fact discovery is complete.

Petitioners assert that SCANA possesses the “substantial rights” of controlling the litigation, choosing its counsel, and choosing the defendants in this litigation.² The unique relationship between the derivative plaintiff and the nominal defendant under Rule 23(b)(1), SCRCF, however, defeats this assertion. The rule describes a derivative action as one “brought by one or more shareholders or members to enforce a right of a corporation” Rule 23(b)(1), SCRCF. This representative relationship gives rise to the “rule of corporate neutrality.”

[W]here directors are charged with misconduct in office and are sought to be held accountable, the corporation is required to take and maintain a wholly neutral position, taking sides neither with the complainant nor with the defending director.

² Petitioners do not assert that the individual director/officer defendants possess any such rights, and they do not. Petitioners suggest that Dominion may, but Dominion is not a party to this litigation. Because “[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal,” Rule 201(b), SCACR, Petitioners have no ability to invoke the rights of a third party.

Swenson v. Thibaut, 39 N.C. App. 77, 99, 250 S.E.2d 279, 293–94 (N.C. Ct. App. 1978), quoting Solimine v. Hollander, 129 N.J.Eq. 264, 19 A.2d 344 (N.J. Ch. 1941).³ In other words, the rights to control the litigation, to choose counsel, and to choose the defendants to be sued lie with Parler— not with SCANA.⁴

But this does not mean that Parler possesses unfettered control over the corporation or the litigation. The right that SCANA does possess is set forth in Rule 23(b)(1): “The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.” Rule 23(b)(1), SCRCF.

This is not to say that in all cases and in all circumstances a corporation is powerless to resist a derivative action. In some situations, the corporation in whose interest the derivative action is purportedly brought will have interests adverse to those of the nominal plaintiffs bringing the action derivatively, and will of necessity be more than a nominal defendant Additionally, certain defenses which are properly asserted before trial on the merits of the action are peculiar to the corporation alone, and may be properly raised only by the nominal defendant who, for purposes of those matters, ceases to be a nominal defendant and becomes an actual party defendant. These defenses would include the lack of standing of the plaintiffs to sue derivatively for reasons of insufficient representation of shareholders and a failure on plaintiffs' part to make a demand upon the board of directors.

³ Swenson sets forth a lengthy string citation of supporting authority. Id. at 99, 250 S.E.2d 279, 294 (1978). For a more recent analysis, please see D. DeMott, Shareholder Derivative Actions: Law and Practice (2017-18 ed.) §1:1 at 2-3. See also Krakow Bus. Park v. Locke Lord, LLP, 135 F. Supp. 3d 770, 791 (N.D. Ill. 2015), aff'd sub nom. Domanus v. Locke Lord LLP, 847 F.3d 469 (7th Cir. 2017) (“In a shareholder’s derivative suit, the corporation generally cannot participate in the merits of the defense.”); Sobba v. Elmen, 462 F.Supp.2d 944, 947-948 (E.D. Ark. 2006) (“[T]he general rule for corporate participation in a derivative action is that ‘[u]nless the derivative action threatens rather than advances corporate interests, [the corporation] cannot participate in the defense on the merits.’”).

⁴ “Absent extraordinary circumstances, the lead plaintiff in a derivative suit selects lead counsel.” D. DeMott, Shareholder Derivative Actions: Law and Practice (2017-18 ed.) § 6:2 at 856.

Swenson at 100, 250 S.E.2d at 294.

Of course, Petitioners have moved to dismiss Parler's complaint for lack of standing, and they were entitled to do so. But the right to challenge a plaintiff's standing to bring suit differs markedly from the right to control the litigation, the right to choose one's counsel, and the right to choose defendants. Because a ruling upon standing neither "involves the merits" nor "affects a substantial right," the Court of Appeals correctly ruled that it lacked appellate jurisdiction under S.C. Code Ann. § 14-3-330.

III. Petitioners' additional arguments hold no water

A. The "importance and novelty" of the underlying question does not grant appellate jurisdiction

Petitioners cite State v. Register, 308 S.C. 534, 419 S.E.2d 771 (1992) for the prospect that the novelty of the question at hand justifies interlocutory appeal. (Petition at 15) In that case, the Supreme Court agreed to hear the appeal of a 15 year-old girl who had been ordered by the trial court to provide samples of her blood, saliva, and pubic hair in the course of a murder investigation. The minor then petitioned the Supreme Court for a Writ of Supersedeas. The Court noted "[o]rdinarily, this type of order is not directly appealable," but went on to add, "[h]owever, because we are dealing with a novel issue and the rights of a minor, we have chosen to address the merits of the petition." Id. at 536, n.1, 419 S.E.2d at 772.

The circumstances of this case are quite different. Appellants are not before the court on a petition for an extraordinary writ, this case does not involve the bodily integrity of a child, and (thankfully) the factual backdrop of this case does not involve a murder investigation. Therefore, to the extent that State v. Register established a common law "novelty and significance" basis for appellate jurisdiction, it would not apply to this case.

The question of whether South Carolina should recognize an exception to the “continuous ownership rule” is one of first impression. At the same time, in the context of analogous Rule 12(b)(6) motions, our courts have noted that “[a]s a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRPC, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial.” Evans v. State, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001), citing Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980). So, too, in this case would any eventual appellate review benefit from a fully developed factual record. As the guilty pleas of two of the Petitioners have shown us just in the last few months, much is left to be learned about the facts and circumstances of the collapse of the nuclear project, the merger, and whether it was crafted—as the trial court feared—to “be used by egregiously offending officers and directors as a factually blind get-out-of-jail-free card to automatically avoid accountability for their actions.” (App. at 7) Thus dismissal of the appeal was appropriate.

B. The question of the trial court’s distinguishing Johnson v. Baldwin does not grant appellate jurisdiction

Petitioners accuse the Court of Appeals of “authoriz[ing] trial courts to set aside this Court’s precedent when trial courts deem it to restrictive or harsh,” (Petition at 20) further insisting that “the trial court’s novel rejection of Johnson requires appellate jurisdiction to ensure the uniformity of South Carolina law.” (Petition at 22) The question of whether the trial court appropriately distinguished Johnson from the facts of this case, however, has no bearing on whether the order doing so is immediately appealable. Because the trial court’s order neither “involves the merits” nor “affects a substantial right,” the order is not immediately appealable no matter how vociferously Petitioners object to its substance.

C. The federal district court decision does not grant appellate jurisdiction

Petitioners cite Laffitte v. Bridgestone Corp., 381 S.C. 460, 674 S.E.2d 154 (2009) for the premise that certiorari should be granted to the Court of Appeals. Laffitte was not a Rule 242, SCACR ruling, however. Rather, the opinion invoked the rarely-used common law certiorari to the trial court, a procedure that the Court soon thereafter warned “will be as rare as the proverbial ‘hen’s tooth.’” Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep’t of Health & Env’tl. Control, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010). Thus, Laffitte’s relevance to the question of whether this Court should review the Court of Appeals’ order is unclear.

To the extent that the principles cited in Laffitte are relevant to the present question, however, such principles do not warrant certiorari here. Citing a September 2019 ruling from the United States District Court for the District of South Carolina, Petitioners argue certiorari is required “to resolve this conflict and prevent wasted juridical resources at both the state and federal levels.” (Petition at 24) In Laffitte, however, this Court granted certiorari to review an issue concerning the discoverability of trade secrets because it “has been the subject of numerous claims in state and federal courts.” Id. at 472, 674 S.E.2d at 160. The Court further stated that granting certiorari would serve judicial economy by “eliminating the numerous inevitable appeals” Id. In the present situation, however, whether South Carolina recognizes an exception to the Johnson “continuous ownership rule” has been the subject of just two lines of litigation. In the federal case, judgment was issued in favor of the defendants. That order was not appealed. And, thus far, the order has not been published. Two unpublished trial court orders reaching different conclusions do not give rise to the specter of “numerous inevitable appeals” feared in Laffitte.

CONCLUSION

Because the trial court’s order denying Petitioner’s motion for judgment on the pleadings neither “involved the merits” of the case nor “affected a substantial right,” the Court of Appeals

correctly ruled that it lacked jurisdiction to hear the Petitioner's appeal. The petition for a writ of certiorari should be denied.

December 14, 2020

/s/ Graham L. Newman

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