

In the
Supreme Court of South Carolina

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

Appellate Case No. 2020-000619
Civil Action No. 2017-CP-40-06621

RECEIVED

Dec 23 2020

S.C. SUPREME COURT

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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INTRODUCTION

The order dismissing this appeal from an unprecedented order handing control of a company’s litigation over to a non-shareholder warrants certiorari because the nature and effect of that immensely important order make it appealable. S.C. Code Ann. § 14-3-330. Respondent Teresa Parler concedes that it is the *substance* of the order that determines its appealability. *See* Return 4; *see also Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146–47 (2015); *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019). Parler also agrees that the substance of the order below permitted her to pursue derivative claims meant to benefit SCANA Corporation (“SCANA”) despite her lack of any interest or stake in SCANA and its well-being. Granting that license to a non-shareholder effectively transfers control over corporate litigation, choice of counsel, and the selection of defendants outside the company. And Parler does not dispute that an order is immediately appealable if it denies a party’s substantial rights to control its litigation asset, select its counsel, and choose its defendants.

Parler contends that *she*—not SCANA or its sole shareholder Dominion Energy, Inc. (“Dominion”)—somehow holds these rights and that a “corporate neutrality” doctrine (unattested in South Carolina law) that Parler seeks to import from other states somehow bars SCANA from exercising its own rights in this litigation. That argument has no basis in South Carolina law or common sense. SCANA’s rights to control its derivative asset, including by deciding its counsel and defendants, are intertwined with Parler’s inability to represent SCANA in this

derivative litigation. The denial of SCANA's motion to dismiss denies SCANA those substantial rights, and is immediately appealable under this Court's precedent.

The nature and effect of the trial court's order also support appellate jurisdiction because the trial court's decision is the first in South Carolina to give a non-shareholder derivative status. That novel decision threatens to upend long-settled South Carolina corporate law. It also directly conflicts with this Court's clear-cut rule in that a shareholder who loses her shares thereby loses derivative standing. *See Johnson v. Baldwin*, 221 S.C. 141, 149–50, 69 S.E.2d 585, 588–89 (1952). Further, the trial court's decision splits from that of a federal district court that correctly applied this Court's precedent *on the same facts* to deny derivative standing to other non-shareholders.

Parler does not dispute that the trial court stands alone in flouting this Court's binding precedent in *Johnson*. She simply asserts that this departure from black-letter South Carolina law cannot support appellate jurisdiction. But the trial court's order created these unmistakable conflicts on a vital question of South Carolina law by denying SCANA's substantial rights and effectively determining the action. And the now-uncertain nature of derivative standing warrants this Court's immediate resolution. As a result, nothing in Parler's Return to Petition for Certiorari ("Return") overcomes SCANA's showing that the decision below requires this Court's review.

ARGUMENT

I. The Court of Appeals dismissed the appeal based on the order’s label and ignored its substance.

The record shows that the Court of Appeals dismissed the appeal because it viewed a denial of a motion for judgment on the pleadings as categorically non-appealable. *See* App. 344. Parler tries to avoid this conclusion by asserting that the Court of Appeals must have considered the substance of the appeal because SCANA argued that it should. *See* Return 4. But the Court of Appeals’ orders show otherwise. Those short orders dismissing the appeal and denying the petition consist mainly of restatements of the general appealability standards. Beyond these general statements, the Court of Appeals identified just one specific reason for dismissing the appeal: “[T]he denial of a motion for judgment on the pleadings is not directly appealable.” App. 344 (quoting *Rose v. Thrash*, 291 S.C. 459, 459, 354 S.E.2d 378, 378 (1987)). But that reason does not account for the order’s *substance*—nor does Parler explain how it could. Instead, the only reasoning specific to SCANA’s appeal shows that the Court of Appeals made the label assigned to the trial court’s order dispositive of its appealability.

The Court of Appeals thus failed to undertake the case-by-case, particularized inquiry that this Court’s precedent requires. *Morrow*, 412 S.C. at 540, 773 S.E.2d at 147; *Stone*, 426 S.C. at 295, 826 S.E.2d at 870. That threshold departure from this Court’s precedent also warrants certiorari because it then led the Court of Appeals to overlook that the order’s nature and effect make it immediately appealable.

II. The substance of the trial court’s order makes it immediately appealable.

A. The trial court’s order involves the merits and effectively determines the action.

The decision below effectively determines the action and necessarily involves the merits because the denial of SCANA’s substantial rights cannot be remedied by an appeal after final judgment. *See Hagood v. Sommerville*, 362 S.C. 191, 197–98, 607 S.E.2d 707, 710 (2005) (holding an order appealable where “an appeal after final judgment would not adequately protect a party’s interests”). Instead, SCANA will suffer irreversible harm because adverse counsel will prosecute the derivative action to SCANA’s detriment not only here, but in multiple related actions for which SCANA will have to pay.

Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993), which Parler relies on, is not to the contrary. Unlike the denial of a motion to dismiss for lack of personal jurisdiction at issue in that case, there *is* finality in the trial court’s order here permitting a non-shareholder to litigate this derivative action. *Id.* Parler fails to show how “[a]ll defenses remain available to” SCANA going forward, Return 5—an assertion at odds with her newfound contention that the corporate neutrality rule eliminates SCANA’s ability to present most defenses. *See infra* at 6; Return 5.

Parler acknowledges the existence of SCANA’s indemnification obligations without recognizing their import. Return 1. Those obligations mean that SCANA is paying the costs of defending against the claims that Parler is pursuing—and will continue to pay those costs, without a later remedy, if the trial court’s order

permitting Parler to pursue these claims remains intact. *See* App. 365. That result is sufficiently final because no later appeal will repair the trial court’s error. *Hagood*, 362 S.C. at 197–98, 607 S.E.2d at 710.

SCANA may also suffer additional, irreversible harm because Parler’s counsel is litigating direct claims against SCANA’s indemnitees—for which SCANA may be liable—simultaneously with this derivative action. *See* Pet. 14. Indeed, if the trial court’s order stands uncorrected, Parler’s counsel will be able to prosecute this derivative action to bolster SCANA’s indemnification liability (to SCANA’s detriment) in other actions. *See* App. 324–25. Thus, even if a later appeal eventually corrects the trial court’s erroneous grant of derivative standing, Parler’s counsel will have had months or even years to extract ammunition from this case for battles in other venues in which they are seeking *billions* from SCANA’s indemnitees. A reversal after final judgment will provide no relief if Parler’s counsel has already won those battles. Because the trial court’s decision transferring SCANA’s right to control its litigation to Parler threatens to prejudice SCANA in a way a later appeal cannot remedy, it effectively decides the action and necessarily involves the merits. As a result, it is immediately appealable. This Court should grant certiorari to confirm this logical conclusion.

B. The trial court’s order denies SCANA’s substantial rights.

Further justifying this Court’s review is the Court of Appeals’ failure to recognize that the trial court’s order denies SCANA’s substantial rights to control its litigation asset, choose its counsel, and select its defendants. Pet. 11–15. Parler does

not dispute that these rights are substantial ones, the denial of which justifies immediate appeal. *See* Return 5, 7. Parler merely asserts that SCANA does not itself possess those rights in this derivative action. In Parler’s view, *she* holds these rights, even though she is a non-shareholder who lacks standing to pursue the derivative action. *Id.* at 5–6.

Parler premises this assertion on the “rule of corporate neutrality.” *See id.* But that rule has no basis in South Carolina law, and would not apply here even if it did. Parler provides no authorities showing that South Carolina courts have adopted the corporate neutrality principle. *See id.* at 6 & n.3 (citing North Carolina, New Jersey, Northern District of Illinois, and Eastern District of Arkansas decisions). There are none. Especially given the trial court’s erroneous adoption of foreign authorities directly opposed to binding South Carolina law, *see* Pet. 21, this Court should not adopt this foreign rule here to reject an appeal that South Carolina law allows.

Parler’s corporate neutrality rule would not apply here or preclude SCANA’s appeal even if it existed under South Carolina law. That rule does *not* require a corporation to remain neutral in a derivative action if the corporation has “interests adverse to those of the nominal plaintiffs bringing the action derivatively.” *Swenson v. Thibaut*, 39 N.C. App. 77, 100, 250 S.E.2d 279, 294 (1978); *see also* *Washington Frontier League Baseball, LLC v. Zimmerman*, 2017 WL 10440087, at *4 (S.D. Ind.

May 15, 2017) (the corporation can participate in the defense on the merits if “the derivative action threatens rather than advances corporate interests”).¹

Parler and her counsel’s interests are adverse to SCANA’s, and she scarcely contends otherwise. SCANA moved to dismiss based on Parler’s non-shareholder status because her “gratuitous inquisition into [SCANA’s] business” threatens SCANA’s interests and wrests from it control of its own litigation asset. *Johnson*, 221 S.C. at 149–50, 69 S.E.2d at 589 (quoting *Kehaya v. Axton*, 32 F. Supp. 266, 268 (S.D.N.Y. 1940)); *see also* Pet. 6–7, 11–12. So, too, do her counsel’s efforts to use this derivative action to prosecute direct claims against Dominion and SCANA’s indemnitees, which further undermine SCANA’s rights to representation by non-hostile counsel and to choose its own defendants. *See supra* at 4–5. Parler and her counsel even staked out the position (in defining which claims were released by a related securities class action) that *this very action* can include direct (and therefore potentially indemnifiable) claims against SCANA’s indemnitees. *See* Ex. 1, *In re SCANA Corp. Securities Litig.* Release Scope Agreement 3, ¶ 2.²

Because Parler and her counsel are threatening SCANA’s interests, the corporate neutrality doctrine does not apply on its face. Instead, SCANA retains the

¹ Nor does the neutrality principle apply when (as here) the alleged wrongdoers no longer control the corporation. *See Zimmerman*, 2017 WL 10440087, at *4.

² This document, which is publicly available on the District of South Carolina’s docket and signed by Parler’s counsel, is judicially noticeable under Rule 201, SCRE.

substantial rights to control its own litigation assets, select its own counsel, and choose which defendants to sue.

Nor is SCANA's challenge to Parler's standing separable from the substantial rights that SCANA retains. SCANA challenged Parler's standing to preserve those substantial rights—meaning that this standing challenge is inseparable from those rights. By rejecting SCANA's standing challenge and allowing Parler to pursue this derivative action, the trial court's order deprived SCANA of its rights of control and selection. This Court should grant certiorari and reverse that refusal to address the deprivation of SCANA's substantial rights.

III. The trial court's decision enshrines a novel and important error that conflicts with this Court's precedent and the District of South Carolina's decision.

The Court of Appeals' decision also merits certiorari because it lets stand a trial court decision that is the first in South Carolina to let a non-shareholder maintain a derivative action—a stance that conflicts with this Court's precedent in *Johnson* and an unappealed decision on the same issues by the District of South Carolina.

A. The pure legal question raised here needs resolution.

Parler simultaneously disagrees that the vital question of South Carolina corporate law raised here is novel or important enough to justify review, *and* at the same time asserts that this question is *too* novel and important to decide on a motion to dismiss. Return 7–8. Neither argument succeeds.

First, the novelty of the trial court's ruling and its contradiction of both this Court's precedent and the District of South Carolina's decision on the same issue

warrant an appeal. The trial court upended decades of precedent and threatened to embroil derivative actions in novel standing disputes. Parler errs in suggesting (at Return 7) that *State v. Register*, 308 S.C. 534, 536 n.1, 419 S.E.2d 771, 772 n.1 (1992), somehow limits the need to review novel issues to the precise factual context of that case. To the contrary, *Register* sensibly recognized that the presence of “a novel issue” supports immediate appellate review. *Id.* And both the novelty and significance of the decision here justify this Court’s review now. *See Ark. Teacher Ret. Sys. v. Mozilo*, 705 F.3d 973, 975 (9th Cir. 2013). (“[D]isputes regarding shareholder derivative standing implicate significant issues of state public policy best resolved by reference to clear rules of state law.”).

Second, this appeal requires no factual development. Whether the trial court erroneously carved out an unprecedented “equitable” exception to *Johnson v. Baldwin*’s longstanding continuous ownership rule presents a pure question of law ripe for decision now. When a dispute hinges on “interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss.” *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001). There is thus no reason for SCANA to suffer the loss of its substantial rights and substantial indemnified defense expenses while “a fully developed factual record” emerges, Return 8, particularly when the trial court’s order

has already passed judgment on “the likelihood of the truth of the matters asserted in Parler’s arguments.” App. 13.

No record development will change the single, undisputed fact relevant to this standing dispute under *Johnson*: Parler no longer owns any SCANA stock. As SCANA has explained, the trial court erred by letting its suspicion about the strength of Parler’s allegations of corporate misconduct overcome the strict continuous ownership rule dictated by South Carolina law. *See* Pet. 18–19 & n.4; *see also* App. 319–21. Those allegations do not bear on the central question of whether Parler has lost standing because she lost her stock. No discovery is needed to decide that question. This Court should review this case now to correct the trial court’s fundamental error in holding otherwise, and to remedy the Court of Appeals’ misapprehension of its ability to correct this error.

B. The trial court’s rejection of *Johnson v. Baldwin* merits certiorari.

Parler does not dispute that the trial court purported to “distinguish[]” the binding, black-letter law of this Court’s *Johnson v. Baldwin* decision. Return 8; *see also* Pet. 18–19. Parler simply contends that the trial court’s decision directly conflicting with this Court’s binding precedent, and the Court of Appeals’ sanctioning of that decision, do not justify immediate appeal or certiorari. The trial court’s refusal to apply binding South Carolina law, however, was essential to its denying SCANA’s substantial rights in a way that cannot later be remedied on appeal. Had the trial court properly applied *Johnson*, it would have preserved SCANA’s substantial rights. Because it did not apply *Johnson*, it denied SCANA’s substantial rights and deprived

SCANA of any remedy for that denial. Further, this flouting of this Court’s precedent highlights the issue’s importance and the need to resolve it now—considerations governing this Court’s certiorari review. *See* Rule 242(b), SCACR. This direct conflict between the trial court’s decision and this Court’s precedent thus supports appellate jurisdiction.

C. The trial court’s split from a federal district court also warrants appellate jurisdiction.

The trial court’s direct split with the District of South Carolina confirms the need for appellate jurisdiction. Resolving such splits is at the heart of this Court’s authority, and this Court should exercise that authority by granting certiorari here. *See Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 472, 674 S.E.2d 154, 160 (2009); *see also* Return 9.

Nor does Parler dispute that a direct federal-state conflict exists on an issue of South Carolina law. Parler instead disputes whether that conflict will proliferate. Indeed, Parler asserts that this Court should let the conflict fester because just “[t]wo unpublished trial court orders” have reached “different conclusions” on the central question of South Carolina derivative standing. Return 9. This assertion ignores all the other derivative actions filed in connection with the abandonment of the V.C. Summer project in 2017. *See Witmer v. Marsh*, No. 3:17-cv-03166-MBS (D.S.C.); *Wickstrom v. SCANA Corp.*, No. 3:17-cv-03181-MBS (D.S.C.); *City of Hollywood Employees’ Ret. Fund v. Marsh*, No. 3:17-cv-3281-MBS (D.S.C.); *Firemen’s Ret. Sys. of St. Louis v. Addison*, No. 3:18-cv-00501-MBS (D.S.C.); *Crangle v. Marsh*, No. 2017-CP-4005791 (Richland Cty.). Although those cases have been consolidated or

voluntarily dismissed, the volume of SCANA derivative filings reflects the typical explosion of shareholder derivative litigation after major corporate events. *See* A. T. Nees, *Who's the Boss? Unmasking Oversight Liability Within the Corporate Power Puzzle*, 35 Del. J. Corp. L. 199, 237 n.159 (2010). Courts in South Carolina will no doubt face more derivative litigation, and the rules that apply to those actions should be clear and consistent. *See Mozilo*, 705 F.3d at 975.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted, and the order dismissing the appeal from the trial court's unprecedented ruling granting shareholder derivative standing to a non-shareholder should be reversed.

Dated: December 23, 2020

Respectfully submitted,

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