THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-000343

Case No. 2020-CP-40-04063

South Carolina Public Interest Foundation, and John Crangle, Individually and on behalf of all others similarly situated, Appellants,

v.

Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Respondents.

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Appellants, by their undersigned counsel, submit this response in opposition to Respondents' Motion to Dismiss the present appeal ("Motion") and request the Court deny Respondents' Motion. Respondents argue that Appellants waived their right to appeal the court's final order because Appellants did not appeal the court's interlocutory order of October 14, 2020 nor the court's interlocutory order of December 17, 2020. Respondents cite no court rule, statute or applicable case law for such a drastic remedy because none exists. Appellants properly appealed from the March 5, 2021 order that finally disposed of their claims in the Amended Complaint. Accordingly, the Motion should be denied.

PROCEDURAL HISTORY & FACTUAL BACKGROUND

A. Hodges' Agreement and DOE's Failure to Comply

Former Governor James H. Hodges brokered an agreement pertaining to the storage of weapons-grade plutonium at the Savannah River Site ("SRS"). This agreement is codified at Title 50, United States Code, Section 2566 ("Section 2566") and provides for the construction and operation of a mixed oxide ("MOX") fuel fabrication facility at the SRS (the "MOX Facility") to mix the highly enriched nuclear material with depleted uranium oxide to produce fuel for nuclear reactors. Section 2566 required the United States Department of Energy ("DOE") to establish a plan to achieve the MOX production objective of "not less than one metric ton of [MOX] fuel per year" by December 31, 2009, and to process thirty-four metric tons of weapons-grade plutonium into MOX fuel by January 1, 2019.

If the DOE did not meet the MOX production objective by January 1, 2014, it would be required to remove from South Carolina (1) at least one metric ton of unprocessed plutonium by January 1, 2016, and (2) an amount of plutonium equal to the amount of all unprocessed plutonium shipped to SRS between April 15, 2002 and January 1, 2022, no later than January 1, 2022. 50 U.S.C. § 2566. Thus, the agreement brokered by Hodges contained a fail-safe that would ensure the removal of the highly toxic weapons-grade plutonium from the State in the event it was not all converted into MOX fuel. In addition, Section 2566 also required that DOE pay the State of South Carolina "economic impact and assistance payments" of $100 million per year from appropriated funds starting in 2016 for each year it fails to comply with deadlines relating to the disposition of the plutonium. (*Id.*)

B. Efforts to Enforce Section 2566 and the August 2020 Settlement

The DOE failed to comply with the terms of Section 2566, and in 2016, Attorney General Wilson retained the Respondent Law Firms to represent the State in its efforts to seek payments

owed to it as a result of DOE's breach of the terms of Section 2566. (Am. Compl., Ex. A, Affidavit of James M. Griffin, Sept. 30, 2020, (attached hereto as Ex. A, and hereinafter referred to as "Griffin Aff."), Ex. 7, Litigation Retention Agreement, Art. 1). In June 2019, the Attorney General and the Law Firms executed an amended retention agreement. *Id.*, Ex. 8. The amended agreement increased the contingency fee percentage Respondent Willoughby & Hoefer, P.A. ("WH") would receive for legal services already provided.[1] (*Id.* pp. 5-6).

On August 28, 2020, Attorney General Alan Wilson ("Wilson") entered into a settlement agreement with the United States (the "Settlement Agreement") regarding the DOE's failure to abide by the Hodges agreement. (Griffin Aff., Ex. 1). Wilson agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. (*Id.* ¶ 5(b)). In exchange, the DOE agreed to pay the State of South Carolina a substantially reduced economic impact and assistance payment of $600 million. (*Id.* ¶ 5(a)). The Settlement Agreement requires the DOE to make "immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys' fees and expenses." (*Id.*)

[1] Respondent WH's services in the district court of South Carolina and Fourth Circuit were completed by the *end of September 2018*. (*See* Griffin Aff., Ex. 6 (noting last docket entry in D.S.C. was in 2017); Ex. 9 (noting argument on briefs concerning appeal of district court ruling held before Fourth Circuit on September 27, 2018)). Both the effective date of the amended fee agreement, *January 1, 2019*, and the execution date of the same, *June 13, 2019*, occurred *after* these efforts. Likewise, the Petition for Writ of Certiorari filed with the Supreme Court appealing the Fourth Circuit ruling occurred prior to execution of the amended fee agreement as well (*June 7, 2019*). (*Id.*, Ex. 10). In fact, the only work completed by Respondent WH *after* execution of the amended fee agreement was a 13-page Reply Brief filed on September 24, 2019. (*Id.*, Ex. 11). Yet, under the terms of the amended fee agreement, Wilson agreed to pay Respondent WH 3% of the ultimate recovery ($18 million) for *work completed prior to the effective date and execution date* of the amended fee agreement and an additional .5% ($3 million) for 46 pages of briefing – 33 of which were *completed prior to the execution date* of the amended fee agreement. Moreover, this additional $21 million fee compensates Respondent WH for legal services that were not successful. Neither the Fourth Circuit nor the United States Supreme Court sided with the State on its action initiated in the South Carolina District Court. (*Id.*, Ex. 9 (Fourth Circuit ruling) & Ex. 12 (U.S. Supreme Court ruling)).

At the time of the settlement, in August 2020, litigation had been unsuccessful for the State. Neither the Fourth Circuit, nor the U.S. Supreme Court sided with the State. (Griffin Aff., Exs. 9 & 12). Similarly, the Law Firms were unsuccessful before the U.S. Federal Claims Court. (*Id.*, Ex. 6, 1:18-cv-00038, Aug. 28, 2019 (ECF No. 33) (judgement in favor of DOE)). The State appealed its loss in the U.S. Federal Claims Court to the U.S. Court of Appeals for the Federal Circuit (*id*. (ECF No. 34) (notice of appeal)), but little historical success would suggest that Respondent WH's appellate services would prove successful. Moreover, such track record cannot be viewed as an impetus for DOE to settle the claims.

Rather, the Settlement Agreement was a political resolution brokered by elected leaders. Governor McMaster stated the State ultimately reached a settlement because of the "zealous advocacy" of its state and federal legislators and their coordination with members of the Trump Administration. (Griffin Aff., Ex. 2). Absent the political efforts of the State's elected leaders, including Governor McMaster and Senator Graham, the DOE would have continued to "repeatedly ignore[] its obligations" to the State under Section 2566. (*Id.*)

However, under the amended fee agreement, Wilson agreed to transfer $75 million of the $600 million to the Law Firms, even though at the time of the Settlement, the Law Firms had not achieved injunctive or monetary relief for the State.

C. Appellant's Initial Filings & Wilson's Efforts to Thwart the Injunctive Relief Sought

On September 25, 2020, before Wilson transferred $75 million to the Law Firms, Appellants filed the present action against Wilson seeking a declaratory judgment that Wilson lacked authority to pay $75 Million from the Settlement, intended solely for the State, to private law firms as attorneys' fees absent a court order, authorization from the General Assembly, or a provision in the Settlement Agreement providing that the DOE was paying the fees. Appellants

contend that the payment of $75 million to the Law Firms violates the Separation of Powers Clause of the South Carolina Constitution. Appellants also contend that even if the United States had agreed to pay the State's attorneys' fees (which it did not), the $75 million for the work in this case seems patently excessive and unreasonable, especially when the settlement came to fruition because of the efforts of legislators after a history of unsuccessful litigation efforts.

With the Complaint, on September 25, 2020, Appellants filed a motion for a temporary restraining order and preliminary injunction, seeking to enjoin Wilson's payment of $75 million to the Law Firms ("Initial Motion"). Wilson received copies of both of Appellants' filings that same day and was copied on Appellants' request to the circuit court to schedule a hearing on Appellants' Initial Motion. (Griffin Aff., Ex. 14).

Wilson's counsel emailed the circuit court requesting that the hearing on Appellants' Initial Motion not be held until Thursday, October 1, 2020. (*Id*. at Ex. 15). The circuit court responded that Appellants' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., over Wilson's objections. *(Id.)* On the afternoon of September 28, 2020, Appellants' counsel emailed counsel for Wilson asking that Wilson agree not to disburse the disputed funds until the case could be decided on the merits. Counsel for Wilson ultimately responded, "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." (*See id.*, Ex. 17).

Unbeknownst to Appellants and the circuit court, Wilson had already received the $600 million in settlement proceeds. Moreover, aware of the pending hearing on the Initial Motion Tuesday afternoon, Wilson expedited the $75 million transfer to the Law Firms on Tuesday morning- just hours before the scheduled hearing. Following this calculated transfer, just moments before the 3:00 p.m. hearing Tuesday, September 29, 2020, the circuit court and Appellants first learned that the disputed $75 million had been disbursed to the Law Firms. Wilson announced in

his memorandum in opposition to the Appellants' request for a temporary restraining order, circulated at 2:12 p.m., that the disputed funds had been transferred to the Law Firms, and therefore Wilson contended Appellants' entire case was moot. (*See* Mem. Att'y Gen. in Opp'n to Mot. TRO or Temp. Inj., Sept. 29, 2020, at 2-3, 2020-CP-40-04603, attached hereto as Ex. B).

Following the hearing, Appellant Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds had not been transferred to the Law Firms. Appellants' counsel informed the Court of this purported fact. (Griffin Aff., Ex. 18). The circuit court set another hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Wilson stated that his office had confirmed that the Law Firms had received the disputed funds. *See id.* During the hearing, out of an abundance of caution, the circuit court announced its intent to enter a temporary restraining order preventing the State from transferring funds to the Law Firms, in the event the funds had not been transferred. Following the hearing, the Court entered such order. That order expired at 5:00 p.m. on Friday, October 2, 2020.

On the morning of September 30, 2020, the Treasurer confirmed that the proceeds had been wired to the Law Firm on September 29, 2020, just hours before the 3:00 p.m. hearing: "[t]he Treasurer's office received a warrant for payment from the Comptrollers' Office Monday night [September 28, 2020]." Therefore, the Treasurer's Office "processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm's account." (Griffin Aff., Ex 19).

D. Appellants' Amended Filings and Respondents' Continued Efforts to Avoid a Resolution of the Claims on the Merits

As a result of Wilson's eleventh-hour transfer of the $75 million to the Law Firms, Appellants amended their complaint on September 30, 2020 naming the Law Firms as additional defendants because they had received the public funds. At the same time, Appellants filed their second Motion for Temporary Restraining Order and Preliminary Injunction. Thereafter, the

circuit court, Honorable Alison R. Lee, entered an Ex Parte Temporary Restraining Order (TRO) restraining Law Firms from dispersing the proceeds.

On October 2, 2020, the Law Firms filed a Petition for Writ of Supersedeas with the South Carolina Court of Appeals seeking to vacate Judge Lee's TRO. Appellants filed their response to the Petition on October 5, 2020. Appellants also filed a Petition for Original Jurisdiction in the South Carolina Supreme Court on October 5, 2020. On October 6, 2020, Respondents filed a Motion to Certify Respondents' Petition for Writ of Supersedeas with the South Carolina Supreme Court. Also, on October 6, 2020, the Court of Appeals entered an order denying the Petition.[2] On October 26, 2020, the Court of Appeals dismissed the Law Firms' appeal from the entry of a TRO.

On October 7, 2020, Judge Lee conducted a hearing on Appellants' Motion for Preliminary Injunction. On October 14, 2020, Judge Lee denied Appellants' motion. On October 23, 2020, Appellants filed a motion to alter or amend Judge Lee's order denying the motion for preliminary injunction. On December 17, 2020, Judge Lee denied the motion to alter or amend.

When Judge Lee issued her December 17, 2020 Order, the Respondents had previously filed motions to dismiss the Amended Complaint. Respondents requested that Judge Lee rule upon the Motions to Dismiss, but Judge Lee refused. (*See* Exhibit K to Pls.' Opp'n Mot. Dismiss, Judge Lee email to Counsel, Oct. 28, 2020, attached hereto as Ex. C). Appellants filed a memorandum in opposition to the motions to dismiss on January 20, 2021.

On January 27, 2021, the Honorable R. Kirk Griffin conducted a hearing on the motion to dismiss. Judge Griffin granted the Motion to Dismiss on March 5, 2021, ruling that the Plaintiffs lacked standing, and declining to rule on the merits.

[2] On November 18, 2020, the Supreme Court entered an order denying the Motion to Certify as moot.

Appellants filed a timely Notice of Appeal on March 29, 2021. Thereafter, Respondents filed the present Motion requesting relief that is not supported by statute, case law, or court rules. Moreover, Respondents requested relief that would eliminate the possibility that they are required to defend the reasonableness of a $75 million fee from State funds when the Law Firms' litigation efforts repeatedly failed to obtain injunctive or monetary relief for the State, and the political bargaining and efforts of the State's elected leaders were largely responsible for achieving the settlement.

ARGUMENT

A. Judge Lee's Orders did not dispose of the claims in the Amended Complaint, and thus, were interlocutory and not final judgments.

Respondents argue that Appellants cannot appeal Judge Griffin's March 5, 2021 order dismissing the Amended Complaint because Appellants did not appeal Judge Lee's interlocutory order denying Appellants' motion for a preliminary injunction. This argument is contrary to South Carolina precedent: "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Norwest Properties, LLC v. Strebler*, 424 S.C. 617, 622-23, 819 S.E.2d 154, 157 (Ct. App. 2018) (quoting *Ex Parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005)); *see also Good Hartford Accident & Indem. Co.*, 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942): ("A judgment, order, or decree, to be final for purposes of an appeal or error, must dispose of the cause . . . as to all the parties, reserving no further questions or directions for future determination. It must . . . leav[e] nothing to be done but to enforce by execution what has been determined." (quoting 2 Am. Jur. 860, § 22)).

In the present case, neither Judge Lee's October 14, 2020 Order nor the December 17, 2020 Order constitutes a final order requiring Appellants to appeal within thirty days. Neither order disposed of Appellants' causes of action against the Respondents, nor constituted a judgment on

the merits of Appellants' claims. Instead, the orders merely denied Appellants' request for ***preliminary*** injunctive relief. Had Judge Lee's orders disposed of Appellants' claims, Respondents would not have needed to file motions to dismiss the very claims they now argue were finally determined by Judge Lee's orders. Moreover, had Judge Lee intended for these orders to constitute final orders resolving all issues in the case, Judge Lee could have granted Respondents' request to enter judgment. However, Judge Lee properly denied such a request because the Court limited its ruling to the request for preliminary injunction. (*See* Ex. C attached hereto).

Respondents' contention is not only contrary to South Carolina case law; it also encourages piecemeal review of orders that the circuit court could later alter or amend because ***they were not final.*** *See Ashenfelder v. City of Georgetown*, 698 S.E.2d 856 (S.C. Ct. App. 2010) ("Appellate courts should not delve into the realm of reviewing decisions that may be altered by the trial judge"). Judge Lee orders addressed a request for ***preliminary*** injunctive relief. She could have altered her ruling, as could any other judge, at any time prior to final judgment.

Finally, Respondents cite no case law supporting their request to dismiss the appeal. Neither case relied on by Respondents in their Motion to Dismiss the Appeal address a factual scenario in which an appellate court dismissed the appeal because the appellant failed to appeal an interlocutory order. Instead in each case, the appellate court affirmed the final order of the lower court from which the appeal was taken. *See Bakala v. Bakala*, 576 S.E.2d 156 (S.C. 2003); *McAleese v. McAleese*, 424 S.E.2d 558 (S.C. Ct. App. 1992). Neither case supports Respondents' position that the appeal should be dismissed; accordingly, Respondents' Motion should be denied.[3]

[3] Respondents petitioned the South Carolina Supreme Court to grant certiorari over the very appeal they argue should be dismissed. That petition was filed the same day as the present motion.

B. Judge Lee's Orders are not binding on Appellants' claims.

The factual and legal rulings in Judge Lee's Orders were not binding on the merits of Appellants' claims. In *University of Texas v. Camenish*, the United States Supreme Court explained that "given the haste that is often necessary" when addressing a motion for preliminary injunction, "the findings of fact and conclusions of law made by a court . . . are not binding at trial on the merits." 451 U.S. 390, 395 (1981) (*citing Industrial Bank of Washington v. Tobriner,* 132 U.S. App. D.C. 51, 54, 405 F.2d 1321, 1324 (1968); *Hamilton Watch Co. v. Benrus Watch Co*., 206 F.2d 738, 742 (2d Cir. 1953)) Even if Judge Lee's Orders constituted "law of the case"—which they do not—the scope of their application is necessarily circumscribed to the request for injunctive relief. The Orders' findings and conclusions of law are not binding on the merits of Appellants' claims. Thus, until Judge Griffin dismissed Appellants' claims based on his adoption of Judge Lee's finding that Appellants lacked standing, such determination was neither the law of the case nor ripe for appeal.

In the two cases cited by Respondents, the appellate court did not face the question of dismissing an appeal based on "law of the case." Rather, the court affirmed a decision of a lower court based on a final order concerning the merits of the case. *See Bakala*, 576 S.E.2d 156; *McAleese*, 424 S.E.2d 558. Accordingly, the Court should deny Respondents' Motion and permit the appeal of the final order in the underlying action to proceed.

CONCLUSION

Based on the foregoing, the Respondents' Motion to Dismiss the Appeal should be denied.

Respectfully submitted,

May 17, 2021

s/ *James M. Griffin*

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