

RECEIVED
Jul 08 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Roger C. Young, Circuit Court Judge

Appellate Case No. 2020-000915
Case No. 2018-CP-08-01079

Latarsha Docena- Guerrero,		Appellant,
	v.	
Rafael Docena-Guerrero,		Defendant
and		
Government Employees Insurance Company, as underinsured motorist insurance carrier,		Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Latarsha Docena-Guerrero respectfully petitions the Court for a rehearing of its Unpublished Opinion No. 2022-UP-270, filed on June 22, 2022, based upon the following points overlooked or misapprehended by the Court:

I. THE DECISION FAILS TO CONSIDER THE MODE OF TRIAL EXCEPTION TO THE GENERAL RULE THAT INTERLOCUTORY ORDERS ARE NOT IMMEDIATELY APPEALABLE.

Appellant argues this matter is immediately appealable because the orders below affect the mode of trial and thereby affect a substantial right. (Reply Br. 1.) However, in dismissing the

appeal on the basis the issue is not immediately appealable, the Court does not address the fact that the appealed orders affect the mode of trial and thereby affect a substantial right. Rather, the Court overlooks the exception whereby an interlocutory order is immediately appealable if it affects the mode of trial.

The Court cites to *Brown v. County of Berkeley* as supplying the standard for when an order below affects a substantial right and thereby is appealable despite being an interlocutory order, and the Court states that standard as requiring that an order determine the action and prevent a judgment from which an appeal may be taken or discontinue the action. That statement of when an order is immediately appealable as affecting a substantial right is overly narrow and misapprehends the relevant law of appealability. The Court's reliance on *Brown* fails to recognize the exception whereby an interlocutory order is immediately appealable when it affects the mode of trial.

As recognized by the South Carolina Supreme Court in *Hagood v. Sommerville* in 2005 and numerous decisions prior to *Hagood*, South Carolina law provides that “the denial of a party’s right to a particular mode of trial is immediately appealable as a substantial right.” 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). The *Hagood* decision first states the same general rule on when an order affects a substantial right as stated in *Brown*—“when [the order] (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action”—and then provides that “[i]n a well-established exception to the general rule, we repeatedly have held that the denial of a party’s right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2).” *Id.* at 196, 607 S.E.2d at 709.

The *Brown* decision issued eleven months after *Hagood* did not overrule *Hagood* or otherwise change the “well-established exception” that an order affecting a mode of trial is an order affecting a substantial right and thereby immediately appealable. Since the *Brown* decision,

the Court issued numerous decisions applying the affecting the mode of trial exception. *See, e.g., S.C. Community Bank v. Salon Proz, LLC*, 420 S.C. 89, 93, 800 S.E.2d 488, 490 (Ct. App. 2017) (“Orders affecting the mode of trial affect substantial rights under [§ 14-3-330(2)] and must, therefore, be appealed immediately.” (quoting *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998)); *Frampton v. S.C. Dep’t of Transp.*, 406 S.C. 377, 385, 752 S.E.2d 269, 274 (Ct. App. 2013) (“Orders affecting the mode of trial affect a substantial right as defined in section 14-3-330(2) of the South Carolina Code (1976), and must, therefore, be appealed immediately.” (internal quotation omitted)); *Bowers v. Thomas*, 373 S.C. 240, 247, 644 S.E.2d 751, 754 (Ct. App. 2007) (“If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable and failure to do so forever bars appellate review.”) Therefore, the Court overlooked the applicable exception whereby an interlocutory order is immediately appealable if it affects the mode of trial, and the orders at issue here are immediately appealable if they affect the mode of trial.

As set forth in Appellant’s Reply Brief, a trial court’s decision to permit a UIM insurer to appear and take over the defense despite failing to comply with the thirty-day requirement of Section 38-77-160 of the South Carolina Code affects the mode of trial for the plaintiff and is thereby immediately appealable. Here, had Respondent complied with the thirty-day requirement of Section 38-77-160, Respondent would be permitted to take over the defense of this action as the UIM carrier. But Respondent’s ability to take over the defense of this action exists solely by virtue of Section 38-77-160, and absent such statute, a plaintiff would proceed solely against the tortfeasor with the UIM carrier not participating in the suit. A trial court permitting a UIM insurer to take over the defense where the requirements of Section 38-77-170 have not been met thus affects the mode of trial for the plaintiff because the plaintiff then no longer has the common law

mode of trial in which she proceeds solely against the tortfeasor and does not have to litigate against her own insurer. By permitting a UIM insurer to take over the defense, the trial court creates a right for the UIM insurer where one did not previously exist and eliminates the plaintiff's right to not have to litigate against one's own first-party insurer in an action against a third-party. Moreover, in the situation here where the UIM carrier did not attempt to take over the defense until after the expiration of the thirty-day requirement of Section 38-77-170 and after the plaintiff entered into a covenant not to execute with the at-fault driver for a portion of her damages, the plaintiff would otherwise have the option to resolve the case through an abbreviated bench trial. With the UIM carrier permitted to take over the defense after the thirty-day period provided for in Section 38-77-160, the plaintiff no longer has the option to select an abbreviated bench trial mode of trial. For these reasons, the orders at issue here affect the mode of trial in this case and are therefore immediately appealable.

II. THE DECISION ERRONEOUSLY TREATS THE APPEALABILITY OF THE ORDERS BELOW AS THE SETTING ASIDE OF AN ENTRY OF DEFAULT.

Of the five authorities cited by the Court as establishing that this issue is not immediately appealable, two state the standard for when an interlocutory order is immediately appealable and the remaining three authorities—*Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988); *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 615 S.E.2d 437 (2005); *Ateyeh v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 361 S.E.2d 340 (Ct. App. 1987)—provide that orders setting aside an entry of default are not immediately appealable. The Court's treatment of the issue as whether an order setting aside an entry of default is appealable misapprehends the nature of the orders at issue here.

The circuit court found, and the parties agree, that there was no entry of default or default judgment here. (R. pp. 1 & 4) The issue here is a statutory issue as to whether a UIM carrier can

take over and defend an action where the UIM carrier fails to appear within the thirty-day requirement provided in Section 38-77-160. The effect of Section 38-77-160 is to provide a UIM carrier a limited period in which to elect to participate in the defense of a claim and otherwise bar a UIM carrier from participating in the defense. Section 38-77-160 does not operate to impose a default judgment, and Rule 55(c) of the South Carolina Rules of Civil Procedure is immaterial to Section 38-77-160.

III. THE DECISION OVERLOOKS THAT FAILING TO PROVIDE AN IMMEDIATE APPEAL OF THE ISSUE WOULD NOT ADEQUATELY PROTECT APPELLANT'S INTERESTS AND WILL CAUSE THIS ISSUE TO CONTINUE TO EVADE APPELLATE REVIEW.

In *Hagood*, the South Carolina Supreme Court found the grant of a motion to disqualify a party's attorney was immediately appealable in part because "an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification." *Hagood*, 362 S.C. at 198, 607 S.E.2d at 710. The Court overlooked that the denial of an immediate appeal here would similarly fail to adequately protect Appellant's interests because it would be difficult to ascertain after a trial in this case whether the orders permitting Respondent to defend prejudiced Appellant. As discussed in Appellant's Reply Brief, the denial of her right to an immediate appeal of the issue would prejudice Appellant, but it may be difficult or impossible for Appellant to establish that prejudice in a subsequent appeal.

Moreover, the issue here is one that needs resolution not only to provide clarity to the parties in this case but also to provide clarity to the bar and insurers generally. Were the issue not decided now, the parties likely would resolve this case without any subsequent appeal. The same is likely true for other cases in which the issue arises. Were the Court not to address the issue here,

the bar and insurers will continue to struggle with this issue due to the lack of any appellate ruling and the issue will continue to evade appellate review.

For the reasons set forth herein, Appellant respectfully requests rehearing in this case.

Respectfully submitted,

s/F. Elliotte Quinn IV
F. Elliotte Quinn IV
Steven E. Goldberg
The Steinberg Law Firm, LLP
103 Grandview Drive
Summerville, SC 29483
(843) 871-6522

Attorneys for Appellant

July 7, 2022
Summerville, South Carolina

RECEIVED

Jul 08 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Berkeley County
Court of Common Pleas
Roger C. Young, Circuit Court Judge

Appellate Case No. 2020-000915
Case No. 2018-CP-08-01079

Latarsha Docena-
Guerrero,

Appellant,

v.

Rafael Docena-Guerrero,

Defendant

and

Government Employees
Insurance Company, as
underinsured motorist
insurance carrier,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies on July 7, 2022, he caused a copy of the foregoing Petition for Rehearing to be served on all parties of record by e-mail and by placing copies in the U.S. Mail, first class, postage prepaid, and addressed as follows:

Thomas H. Milligan
Milligan & Hearn, PC
721 Long Point Road, Ste. 401
Mt. Pleasant, SC 29464
tom@milliganlawfirm.com

Jonathan S. Altman
Derfner & Altman, LLC
575 King Street, Ste. B
Charleston, SC 29403
jaltman@derfneraltman.com

s/F. Elliotte Quinn IV
F. Elliotte Quinn IV
The Steinberg Law Firm, LLP
103 Grandview Drive, Ste. A
Summerville, SC 29484
(843) 871-6522



STEINBERG
LAW FIRM | LLC
Get The Firm Behind You

103 Grandview Drive | P.O. Box 2670 | Summerville | SC | 29484 | (843) 871-6522 Main | (843) 871-8565 fax | www.steinberglawfirm.com

July 7, 2022

RECEIVED

Jul 08 2022

SC Court of Appeals

VIA U.S. MAIL AND E-MAIL

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
sspencer@sccourts.org
ctappfilings@sccourts.org

Re: Petition for Rehearing
Latarsha Docena-Guerrero vs. Rafael Docena-Guerrero
Case No. 2018-CP-08-01079
Appellate Case No. 2020-000915

Dear Hon. Clerk Kitchings,

Enclosed please find Appellant's Petition for Rehearing in the above-referenced appeal. A check in the amount of the \$50.00 filing fee is enclosed with the copy of this letter sent via United States Mail.

Regards,

s/Elliott Quinn

F. Elliott Quinn IV
equinn@steinberglawfirm.com
843-871-6522

FEQ/mbc

Enclosures (as stated)

July 7, 2022

Page 2

cc: (via U.S. mail and email)

Jonathan S. Altman
Derfner & Altman, LLC
575 King Street, Suite, B
Charleston, SC 29403
jaltman@derfneraltman.com

Thomas H. Milligan
Milligan & Hems, PC
721 Long Point Road, Suite 401
Mount Pleasant, SC 29464
tom@milliganlawfirm.com