

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jul 29 2022

APPEAL FROM UNION COUNTY
Court of Common Pleas
William A. McKinnon, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2022-000853

Dwayne Thompson, Respondent,

v.

LG Chem, Ltd., LG Chem America, Inc.,
and Rolling Fog Vapor Company, LLC,Defendants,

Of whom, LG Chem, Ltd. and LG Chem America, Inc. are the..... Petitioners.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I. Is an interlocutory order denying a motion under 12(b)(2), SCRCP immediately appealable?

ARGUMENTS

Respondent respectfully submits this Return to address Petitioners' contention that the subject Order denying Petitioners' Motion to Dismiss is immediately appealable. "The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe." S.C. Const. Art. V § 5. The General Assembly has expressed a preference that some interlocutory trial court rulings go uncorrected until the appeal of a final judgment. S.C. Code Ann. § 14-3-330 defines the appellate jurisdiction of this Court as well as the Court of Appeals. *See* S.C. Code Ann. § 14-8-200. Section 14-3-330 provides for the immediate appeal of intermediate or interlocutory orders in three scenarios.

The first scenario occurs when an order involves the merits of an action commenced in the trial courts. S.C. Code Ann. § 14-3-330(1). The second scenario occurs when an order affecting a "substantial right . . . **(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.**" *Id.* § 14-3-330(2) (emphasis added). The third scenario occurs when an interlocutory order grants, continues, modifies, or refuses an injunction. *Id.* § 14-3-330(4). Petitioners seek to convince the Court that litigants should routinely be able to immediately appeal orders denying a motion to dismiss for lack of personal jurisdiction under the second scenario, purportedly because they affect a substantial right, i.e., Petitioners' due process rights. However, Petitioners fail to account for the entirety of section 14-3-330(2)'s requirements for an immediate appeal.

An order must (1) affect a substantial right and (2) prevent a judgment from which an appeal may later be taken in order to be immediately appealed. *Edwards*, 369 S.C. at 95, 631 S.E.2d at 531. “The provisions of Section 14-3-330, including subsection (2), have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed.” *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). South Carolina courts have only found a substantial right giving rise to an immediate appeal from an interlocutory order in a few scenarios. See *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 566-67, 725 S.E.2d 926, 928-29 (holding that an order of substitution derives from common law right of plaintiff to choose defendant and is immediately appealable); *Hagood*, 362 S.C. at 197, 607 S.E.2d at 710 (finding that an order granting a motion to disqualify a party’s attorney in a civil case affects a substantial right); *Flagstar Corp. v. Royal Surplus Line*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) (stating that when a trial court’s order deprives a party of a mode of trial it affects a substantial right). Thus, the Court’s prior decisions finding that an interlocutory order impacts a substantial right are extremely narrow in scope and have only applied to rights that are constitutionally derived or can trace their roots to long-standing common law principles.

While an order denying a Rule 12(b)(2) motion to dismiss arguably does affect a substantial due process right, the hole in Petitioners’ argument is that the Order does not prevent a judgment from which an appeal may later be taken, discontinue the action, grant or refuse a new trial, or strike an answer or any part of an answer or pleading. This is because there is no finality to such orders:

Further, after a prima facie showing, the appeal of the personal jurisdiction issue prior to a full development of the facts serves no useful function. There is no finality in a denial of the motion to dismiss for lack of personal jurisdiction. Just as with a denial of a 12(b)(6), the prima facie showing will succeed or fail at trial.

It would be inconsistent with this Court's decisions dealing with other pre-trial dismissal motions if a special niche were maintained for personal jurisdiction. Carlton still may show that there is a lack of personal jurisdiction at trial, and may still be entitled to other procedural relief based on the evidence.

Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). Petitioners may still appeal the Order after a final judgment is reached in this action, and they may even choose to bring the issue of personal jurisdiction before the Circuit Court again at a later stage in the proceedings on a motion for summary judgment or at trial.

Petitioners' reliance on *Keller v. Keller*, 296 S.C. 411, 373 S.E.2d 692 (Ct. App. 1988), is unavailing. In *Keller*, the Family court denied a post-judgment 12(b)(2) motion **after** a divorce was granted and the movant was ordered to pay alimony and child support. The motion was appealed, but the Court of Appeals never addressed the appealability of the order, the context of the procedural posture of the case, or whether any provisions of section 14-3-330 applied to the facts. Further, *Keller* has never been relied on by any precedential authority for the proposition that a prejudgment, interlocutory order denying a 12(b)(2) motion may be immediately appealed. On the other hand, *Mid-State Distributors* unequivocally holds that an interlocutory order denying a 12(b)(2) motion is not immediately appealable.

By its terms, the subject Order does not unequivocally prevent the parties from reaching a judgment, nor does it prevent Petitioners from appealing an adverse judgment or relitigating personal jurisdiction prior to judgment. The Order does not grant or refuse a new trial or strike out a claim or defense. Petitioners wish to have the ability to appeal the Order, not because it effectively resolves the proceedings without the opportunity for an appeal, but because they wish to protract the litigation and get a second bite at the apple. It is not difficult to imagine how Petitioners' desire for this Court's approval of the immediate appeal of 12(b)(2) motions will

quickly swamp the appellate courts in unending personal jurisdiction disputes protracted by well-funded defendants.

The judicial system should promote the efficient and speedy disposition of every action, while affording a right to appellate review. Rule 1, SCRCP. In the vast majority of cases, this balance is struck by the general rule allowing an appeal only from a final judgment. “The final judgment rule serves the laudatory goal of preventing piecemeal review of matters that are merely steps toward a final judgment.” *Doe v. Howe*, 362 S.C. 212, 216 607 S.E.2d 354, 356 (2004). The piecemeal review of interlocutory orders is highly disfavored because clear and settled issues of law and fact can be repetitively submitted to the appellate courts, delaying the progress of a case for several years. *See Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13-14 (2000). Because the volume of litigation within the judicial system is substantial, the final judgment rule conserves judicial resources.

If the appellate framework permitted parties to appeal every pretrial order denying 12(b)(2) motions, the trial process would be severely disrupted. Constant interruption of pretrial procedures and trial would follow from a general practice of discretionary appeals from interlocutory orders and would consume trial court time, forestall the ultimate resolution of the case, and facilitate the harassment of one party by his opponent. *See Cobbledick v. United States*, 309 U.S. 323, 325-26 (1940) (Frankfurter, J.). Appellate interlocutory order review can take years to resolve. Since substantial time elapses before appellate determination, in each instance it would be necessary for the circuit court to spend extra hours refamiliarizing itself with the case before it can begin anew.

There is no need for the Court to hold that orders denying 12(b)(2) motions, and the subject Order in particular, are immediately appealable under section 14-3-330(2). Under the

facts presently before the Court, it is clear that the Order at issue does not prevent a judgment from which Petitioners could appeal the Order. This is exactly why the Court of Appeals dismissed Petitioners' appeal, and this Court should dispose of their Petition for Writ of Certiorari in the same manner.

CONCLUSION

While interlocutory orders are generally not immediately appealable, S.C. Code Ann. § 14-3-330 could serve to permit the immediate appeal of some interlocutory orders on a very limited, case-by-case basis. Under the facts before the Court, Petitioners have not demonstrated that the Order at issue warrants an immediate appeal. The Court may continue to follow precedent and find that in this case, and conceivably all orders denying 12(b)(2) motions, immediate appeal is not appropriate. For the foregoing reasons, and those set forth by the Court of Appeals, the Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By:  _____

July 29, 2022
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