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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Appeal No.: 2020-001695

Mark Douglas Hill, III, by and through his Duly appointed Guardian ad Litem, Helen Kaci Hill, Plaintiff..... Respondent,

v.

Cranston Print Works Company d/b/a Cranston Trucking Company, Ryder Truck Rental, Inc., Optimum Staffing, Inc., d/b/a Optimum Logistic Solutions, and Jason E. Burdette, Defendants,

And

Gregory Jones, Sr., as the Father and Duly Appointed Personal Representative of the Estate of Jessica Dawn Jones, Deceased, Plaintiff, ...Respondent,

v.

Cranston Print Works Company d/b/a Cranston Trucking Company, Ryder Truck Rental, Inc., Optimum Staffing, Inc., d/b/a Optimum Logistic Solutions, and Jason E. Burdette, Defendants,

of whom Cranston Print Works Company d/b/a Cranston Trucking Company, Optimum Staffing, Inc., d/b/a Optimum Logistic Solutions, and Jason E. Burdette are the ..... Appellants.

JASON E. BURDETTE'S RETURN IN OPPOSITION TO MOTION FOR ATTORNEY FEES AND SANCTIONS

Pursuant to Rules 222 and 240, SCACR, Appellant Jason E. Burdette submits this Opposition to Respondents' Motion for Attorney Fees and Sanctions. While Respondents

may be entitled to one attorney's fee in the amount of $2,500, pursuant to Rule 222(b), SCACR, they are not entitled to sanctions or multiple awards of attorney's fees.

ARGUMENT

I. Respondents have not and cannot show that sanctions are warranted.

Respondents are not entitled to sanctions in this appeal because they have not and cannot show that the appeal either was "frivolous" or that it was "taken solely for the purposes of delay." Rule 269, SCACR. Respondents have asserted, both in filings with this Court and in "warning" letters to defense counsel, that Appellants knowingly filed an improper interlocutory appeal in order to delay the underlying litigation," going so far as to urge Respondents initially "to reconsider any thoughts of filing for *certiorari* with the Supreme Court," (Motion Exh. B), and then to "refrain from filing a Reply Brief" in response to their opposition to the Petitions for *certiorari* review. (Motion Exh. C).

First, the appeal was not frivolous, as Burdette and the other Appellants had a good faith belief that it fell within the category of permissible interlocutory appeals and/or had a good faith basis for seeking an extension of the law with regard to the appealability of a discovery order that required a defendant to admit to a set of facts that are not supported, either by deposition testimony or otherwise. Indeed, the fact that this Court requested Respondents to file a Return to Appellants' Petitions for Rehearing indicates that this Court saw merit in their Petitions. That is because, while returns to petitions for rehearing are not to be filed unless requested by the Court, "[o]rdinarily … rehearing will not be granted in the absence of such a request." *See* Rule 221(a), SCACR.

While Appellant Burdette candidly acknowledged that his appeal was interlocutory in nature, he had a good-faith belief that it fell within the category of permissible

interlocutory appeals because it raised an issue that directly affects his defenses in the underlying case. Appellant Burdette argued in good faith that the appealed Orders do not simply "direct[] a party to participate in discovery," as was the case in *Ex parte Whetstone*, 289 S.C. 580, 3467 S.E.2d 881 (1986). Instead, they involve the merits and affect a substantial right by binding Burdette to certain admissions that are incorrect, inconsistent with his testimony and would, if allowed to stand, preclude him from presenting contrary evidence at trial.

This Court has recognized previously that it "should look to the *effect* of an interlocutory order to determine its appealability under section 14-3-330(2)(c)" and that "[a]n order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) (emphasis added); *see also Wetzel v. Woodside Dev., Ltd. P'ship*, 374 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (finding order setting aside entry of default immediately appealable because its effect was to end the action completely as to one party). Thus, Appellant Burdette had a good faith belief that this appeal fell within the category of permissible interlocutory appeals because the appealed order affected a substantive right.

Moreover, this appeal is supported by prior case law. Here, the questions eliciting responses at Burdette's March 20, 2020 deposition were worded differently from the Requests for Admission at issue in the appeal. Consequently, Burdette's responses to the Requests for Admission do not match up or "conform," to his deposition responses for the simple reason that the questions posed are worded differently in the two contexts. In *Adams*

v. Orr, the Supreme Court held the defendant was not deemed to have admitted certain facts where "the request for admissions as worded was subject to more than one reasonable interpretation." 260 S.C. 92, 97, 194 S.E.2d 232, 234 (1973). Because the Requests for Admission posed to Appellant Burdette do not track the questions asked at his deposition, such that his responses to the Requests for Admission are consistent and entirely correct, this appeal is directly analogous to *Adams*. Indeed, Appellant Burdette continues to believe that, by requiring him to "admit" to statements that are incorrect and inconsistent with his deposition testimony, the Orders affect a substantial right. *E.g.*, *Airco Indus. Gases, Inc. Div. of BOC Group, Inc. v Teamsters Health & Welfare Pens Fund*, 850 F.2d 1028, 1036 (3rd Cir. 1988) (unlike testimony or other discovery responses, a response to a request to admit "*is … a studied response, made under sanctions against easy denials, to a request to assert the truth or falsity of a relevant fact point out by the request for admission* …"); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 650, 579 S.E.2d 151, 157 (Ct. App. 2003) ("[t]he purpose of Rule 36 is to allow parties to narrow the issues and determine which facts do not need to be proven because they are admitted"). Consequently, this appeal was anything but frivolous because Appellant Burdette had a good faith belief, based in existing case law or an extension of same, that his appeal was a permissible interlocutory appeal.

Second, Respondents admittedly cannot show that this appeal was taken "taken solely for the purposes of delay." Rule 269, SCACR.[1] While there is scant case law applying Rule 269 of the Appellate Court Rules, Rule 72 of the South Carolina Administrative Law Court ("ALC") uses the precise same language, allowing the ALC to

[1] Respondents only suggest that "the appeals *appear* to have been 'taken solely for the purposes of delay,'" (Motion p. 7) (emphasis added), without submitting any evidence that that, in fact, was the case. That is because there is none.

sanction a party who pursues a case "solely for the purposes of delay." *See Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 433 S.C. 47, 855 S.E.2d 325 (Ct. App. 2021). Looking to the plain dictionary meaning of the term "solely," this Court noted that Merriam-Webster defines that term "as (1) 'to the exclusion of all else,' or (2) 'without another.'" 433 S.C. at 56, 855 S.E.2d at 330. In *Town of Arcadia Lakes*, this Court ruled that there was "no evidence in the record that the Town brought or continued the permitting challenge for the *sole* purpose of delay. Instead, there is an abundance of evidence that the Town was concerned about the project's impact on the local ecosystem, the water quality of the surrounding lakes, and whether the project might worsen existing flooding problems." *Id.* Here, similarly, Appellant Burdette had a legitimate concern that Orders requiring him to admit to incorrect statements, based on the circuit court's improper weighing of the evidence, would preclude him from raising certain critical defenses at trial.

Respondents insinuate that, because this Court dismissed the appeal and the Supreme Court denied the Petitions for certiorari review, that that somehow constitutes evidence that the appeal was frivolous or taken for improper purposes. Patently, simply losing an appeal does not constitute grounds for sanctions.

Instead, Appellant Burdette's good faith belief that the appeal was a permissible interlocutory appeal or that, if not, a good faith basis existed to seek an extension of the law, coupled with the fact that there is absolutely no evidence that the appeal was taken for purposes of delay, let alone "*solely*" for purposes delay, demonstrate sanctions are inappropriate in this appeal. Instead, as is discussed below, at best, Respondents may be entitled to one set of attorney's fees, but not more.

II. At best, Respondents may be entitled to one set of attorney's fees, but no more.

Respondents purport to apply for attorney's fees from each of the Appellants. Clearly, they are seeking multiple awards of attorney's fees as a "sanction" for what they incorrectly deem is an improper and frivolous appeal. However, for the reasons set forth above, this appeal was neither frivolous nor taken solely for purposes of delay.

Rule 222, SCACR, provides for one attorney's fee award per appeal, not three and certainly not one for each opposing party where an appeal involves multiple parties. Moreover, although each of the Appellants filed separate pleadings, Respondents filed one response at each stage of this appeal, not three separate responses.[2] Notably, the set $2,500.00 attorney's fee applies in cases that go through full briefing, oral argument and rehearing. Clearly Respondents are not entitled to more.

CONCLUSION

For the reasons stated herein, this Court should deny Respondents' Motion for Attorney Fees and Sanctions.

Respectfully submitted,

MCANGUS GOUDELOCK & COURIE, LLC

November 7, 2022

By: *s/Helen F. Hiser*

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[2] Even if Respondents had filed multiple responses, however, they still would be entitled to only one set of attorney's fees, at best.

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And

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of whom Cranston Print Works Company d/b/a Cranston Trucking Company, Optimum Staffing, Inc., d/b/a Optimum Logistic Solutions, and Jason E. Burdette are the ..... Appellants.

PROOF OF SERVICE

I certify that I have served Appellant **Jason E. Burdette's Return in Opposition to Motion for Attorney Fees and Sanctions** on counsel for Mark Douglas Hill, III, by and through his Duly Appointed Guardian ad Litem, Helen Kaci Hill, and Gregory Jones, Sr., as the Father and Duly Appointed Personal Representative of the Estate of Jessica Dawn Jones, and

other counsel of record by emailing a copy of it in the United States Mail, postage prepaid, addressed as follows:

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November 7, 2022

s/Helen F. Hiser

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VIA S.C. COURTS E-FILING
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: Mark Douglas Hill, III by and through his duly appointed Guardian ad Litem, Helen Kaci Hill v. Cranston Print Works Company d/b/a Cranston Trucking Company, Ryder Truck Rental, Inc., Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions, and Jason E. Burdette / 2019-CP-42-02212
Gregory Jones, Sr., as the father and duly appointed Personal Representative of the Estate of Jessica Dawn Jones v. Cranston Print Works Company d/b/a Cranston Trucking Company, Ryder Truck Rental, Inc., Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions, and Jason E. Burdette / 2019-CP-42-02215

Date of Incident:	February 1, 2019
Carrier Claim No.:	501-831720
MGC File No.:	2094.20153
Appeal No.:	2020-001695

Dear Ms. Kitchings:

Enclosed please find the original of Appellant Jason E. Burdette's Return in Opposition to Motion for Attorney Fees and Sanctions, and the Proof of Service in the above-referenced matter. We are serving counsel of record via email only.

If you have any questions, please do not hesitate to contact me.

Yours truly,

Helen F. Hiser

Attachments

cc: Alexander P. Lewis, Esq.
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