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Feb 03 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr., Circuit Court Judge

Case No. 2020-CP-26-04144
Appellate Case No. 2022-001606

Ray Wallauer, Carol Wallauer, John White and Pam White..... Respondents

vs.

Accelerate Solar, LLC; Advantage Solar, LLC; Dividend Solar Finance, LLC;
and Justin Pole, Defendants,

Of which Advantage Solar, LLC is..... Appellant

RESPONDENTS' MEMORANDUM IN
SUPPORT OF DISMISSAL OF APPEAL

I. BACKGROUND FACTS

This case is before this Court based on an appeal filed by Advantage Solar, LLC after its motion to sever was denied by the circuit court. This case involves the sale of solar panels to the Wallauers and the Whites to include the installation and operation of the solar panels by the Appellant. After depositions and other discovery, a mediation was held which was unsuccessful. As the case was about to be placed on the trial roster, Appellant Advantage Solar, LLC moved to sever the claims of the Respondents into two separate trials. The trial judge heard the motion to sever and summarily denied it on a Form 4 Order on October 19, 2022. Respondents' position is

that the law is clear in that an order denying a motion to sever is interlocutory and not immediately appealable.

In denying the motion, The Honorable William H. Seals, Jr. Judge Seals' Order held: "... Defendant's Motion to Sever, it appears that, even though the facts are slightly different, 'overall,' there is a 'common question of law or fact' inherent in both Plaintiffs' claims."

II. APPLICABLE LAW

It is well settled in this state that orders not governed by a specialized appealability statute are not immediately appealable. *Thornton v. SCE&G Corp.*, 391 S.C. 297, 705 S.E.2d 425 (2011). The Order denying severance in this case is just such an order. In fact, orders are only immediately appealable in South Carolina if they fit into the specific categories listed under S.C. Code § 14-3-330.

S.C. Code § 14-3-330 (South Carolina Code of Laws, (Supp. 2021)) is applicable to this case. It provides in pertinent part:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (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;

S.C. Code § 14-3-330 prevents piecemeal appeal of litigation. It has been narrowly construed by our courts such that immediate appeal of most orders of the circuit court are not allowed until after a trial has been held on the merits. See *Hagood v. Sommerville*, 362 S.C. 191,

196, 607 S.E.2d 707, 709 (2005). See *Brown v. Reed*, 2013-UP-357 (S.C. App. 2013) attached as Exhibit 1.

In *Thornton v. SCE&G Corp.*, 391 S.C. 297, 705 S.E.2d 425 (2011), this Court took the opportunity to discuss interlocutory orders which are not appealable. The *Thornton* Court made clear: “An order affecting a substantial right striking a pleading is immediately appealable.” This Court then went on to explain that most orders are not immediately appealable. The Court for instance noted that class certification orders and motions to make a plaintiff’s complaint more definite were not immediately appealable.

Of significance in *Thornton*, this Court held: “An order which involves the merits is one which finally determines a substantial matter forming the whole or part of some cause of action or defense.” In this case, the circuit court merely refused to sever the named plaintiffs into two separate lawsuits. This action did not determine a substantial matter and thus it inappropriate to appeal the order denying severance at this point in this litigation.

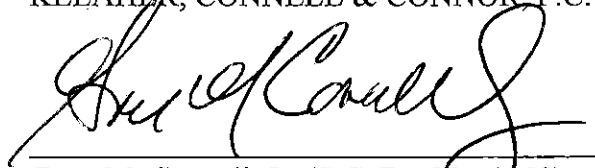
Our courts disfavor piecemeal appeals. Our courts have held that S.C. Code § 14-3-330(2) should be narrowly construed such that immediate appeal of orders issued before or during a trial are generally not allowed. The Supreme Court stated it best in *Breland v. Love Chevrolet Olds Inc.*, 339 S.C. S.C. 89, 529 S.E.2d 11 (2000) when it held that immediate appeals are only allowed in situations where a substantial right is at stake. This is not the case here as Appellant can fully litigate the merits of the case.

In sum, an order denying a motion to sever is a preliminary order not affecting a substantial right and thus is not immediately appealable. Appellant's rights are preserved for any future appeal after the trial of the case.¹

CONCLUSION

Accordingly, Respondents request the Court dismiss this appeal and return it to circuit court for trial.

KELAHER, CONNELL & CONNOR, P.C.



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February 3, 2023
Surfside Beach, South Carolina

¹ It would seem that if a motion to sever was immediately appealable it would have been addressed in the many criminal cases which discuss severance of trials between co-defendants. In fact, in each of the reported criminal cases that have addressed the issue of severance, the issue has not been addressed by this Court until after a trial on the merits. See *State v. Spears*, 393 S.C. 466, 713 S.E. 2d 324 (S.C. App 2011).

Brown v. Reed (S.C. App. 2013)

ff | - 0 +

Joseph Brown, Respondent,

v.

Roger Reed, Jr., individually and d/b/a Triple R Construction, Appellant.

Appellate Case No. 2011-191610

No. 2013-UP-357

Court of Appeals of South Carolina

September 11, 2013

UNPUBLISHED OPINION

Submitted August 1, 2013

Appeal From Sumter County R. Ferrell Cothran, Jr., Circuit Court Judge

William E. DuRant, Jr., of Schwartz McLeod DuRant & Jordan, of Sumter, for Appellant.

Joseph Brown, pro se, of Sumter.

PER CURIAM:

Dismissed pursuant to Rule 220(b), SCACR, and the following authorities: S.C. Code Ann. § 14-3-330 (1976 & Supp. 2012) (providing this court has appellate jurisdiction to review final judgments and interlocutory orders (1) involving the merits or (2) affecting a substantial right when the order "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action"); *Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006) ("An order which involves the merits [under section 14-3-330(1) of the South Carolina Code (1976)] is one that 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense.'" (quoting *Mid-State Distribs. v. Century Imps., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993))); *Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995) (stating that for an order to be appealable under section 14-3-330(2) of the South Carolina Code (1976), the order must involve a substantial right and prevent a judgment from which an appeal may be taken); *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) (noting an order affects a substantial right, as the term is used in section 14-3-330(2) of the South Carolina Code (1976), "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").

APPEAL DISMISSED.^[1]

HUFF, GEATHERS, and LOCKEMY, JJ., concur.

Notes:

^[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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APPEAL FROM HORRY COUNTY
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Case No. 2020-CP-26-04144
Appellate Case No. 2022-001606

Ray Wallauer, Carol Wallauer, John White and Pam White..... Respondents

vs.

Accelerate Solar, LLC; Advantage Solar, LLC; Dividend Solar Finance, LLC;
and Justin Pole, Defendants,

Of which Advantage Solar, LLC is..... Appellant

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served **Respondents' Memorandum in Support of Dismissal of Appeal** on the 3rd day of February, 2023, via email and by depositing a copy of same in the United States Mail, postage prepaid, to:

jsmith@smithhudsonlaw.com
jhudson@smithhudsonlaw.com
Joseph O. Smith, Esquire
Joshua J. Hudson, Esquire
Smith Hudson Law, LLC
200 N. Main St., Suite 301-C
Greenville, South Carolina 29601

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 3rd day of February 2023.

Donna H. Hand
Notary Public for South Carolina
My Commission Expires: 3-28-26

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February 3, 2023

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Re: Appellate Case No. 2022-001606
Ray Wallauer, et al. v. Advantage Solar, LLC.
C/A No. 2020-CP-26-04144
Our File Nos. 2020-0164C and 2020-0165C

Dear Ms. Kitchings:

In response to the Court's letter dated January 25, 2023 requesting a memorandum addressing the appealability of the Order at issue in this case, the Respondents hereby submit their Memorandum in Support of Dismissal of Appeal.

By copy of this letter, I hereby serve counsel for Appellant with Respondents' Memorandum in Support of Dismissal of Appeal via email and via regular U.S. Mail as evidenced by our Proof of Service.

Sincerely yours,



Gene M. Connell, Jr.

GMCJr:sm
Enclosures

cc w/enc.: Joseph O. Smith, Esquire -- jsmith@smithhudsonlaw.com
Joshua J. Hudson, Esquire -- jhudson@smithhudsonlaw.com