

**18 POWERS FARM ROAD
RANDOLPH, MA 02368
781-986-0635 (Tel/Fax)**

RECEIVED

September 5, 2023

SEP 14 2023

SC Court of Appeals

The Honorable H. Bruce Williams
Chief Judge, Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: By Leave of the Court - Motion to Reinstate Appellate Case No. 2022-000811

Dear Judge Williams:

Because of lower court decisions equivalent to a final judgment that will prevent an appeal after a trial, I respectfully request by leave of the Court that Appellate Case No. 2022-000811 be reinstated. The order impacted the merits and substantial rights in the litigation.

BACKGROUND

On June 2, 2021, the Appellant, Benjamin F. Goff, Sr., Trustee, filed an application for rezoning a vacant parcel of land in Georgetown County. It was met with opposition from the Keep It Green organization, whose members reside throughout an area of Georgetown County designated as the Waccamaw Neck. The application was supported by the Planning Department, approved by the Planning Commission and adopted into ordinances by the County Council on October 26, 2021. Having failed to prevent approval of the ordinances, the Respondents filed a declaratory judgment complaint against the County, County Council members and named the Appellant, Benjamin F. Goff, Sr., Trustee, as a defendant in a case filed on January 7, 2022.

The Appellant filed a motion to dismiss Benjamin F. Goff, Sr., Trustee as a defendant on January 25, 2022 that was heard on May 19, 2022 by Judge Steven H. John. In this declaratory judgment action, the Appellant should be a party-in-interest or involuntary plaintiff. Judge John denied the motion and stated that a fairly read cause of action existed against the Appellant despite the absence of and admissions of no claims in the complaint against the Appellant. It was an abused of discretion. Incidental on May 5, 2022, the lower court accepted a Stipulation of Dismissal that remove the County Council members as defendants in the lawsuit based on legislative immunity; thereby, effectively leaving the Appellant as the sole defendant.

Being named as a defendant instead of a party-in-interest or involuntary plaintiff, the Appellant was forced to defend against a potential trial in which he did nothing wrong. The Appellate Court has held on numerous occasions pursuant to § 14-3-330(2), that when a trial court's order deprives a party of a mode of trial to which it is entitled to as a matter of right, such order is immediately appealable. See *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). Such cases not only permitted, but required, immediate appeal in the

event of the denial of a mode of trial to which one is entitled as a matter of right.” Id. The Appellate Court’s traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case. Id.

Although interlocutory, On June 10, 2022, the Appellant appealed the lower court ruling because it was an abuse of discretion, inconsistent with the legislative intent of the Uniform Declaratory Judgment Act, and tantamount to a final judgment to which it has proven itself in the subsequent dismissal of motions for judgment on the pleadings and summary judgment; thereby, setting the stage for the Appellant to be tried, without any genuine material facts and admissions of no claims, for submitting a successful rezoning application. Consequently, the Appellant was forced to appeal the denial of its counterclaim for civil conspiracy along with the denial of the motions for judgment on the pleadings and summary judgment in Appellate Case No. 2023-000615. Fairness and justice should compel the Court of Appeals to reinstate Appellate Case No. 2022-000811 and dismiss the lower court case against this landowner who did nothing wrong in submitting a rezoning application. In *Middleton III et al v. Georgetown County et al*, the Appellant is being unfairly persecuted and prosecuted by the Respondents and by the lower court. In all appearances, the decisions made and orders issued have denied the Appellant of equal protection under the 14th Amendment to the United States Constitution.

A case may be reinstated by leave of the court, upon good cause shown, after notice to all parties. On May 13, 2022, the defendant, Benjamin F. Goff, Sr., Trustee, filed a motion for judgment on the pleadings based on the admissions of no claims by the plaintiffs. With the dismissal of the Appellate Case No. 2022-000811 as interlocutory, the Appellant filed a motion for summary judgment on December 29, 2022 as indicated in the decision rendered in the lower court. Absence a new argument for the appealable interlocutory order, there was no necessity to encumber the Court of Appeals with a reinstatement motion. In essence, despite being beyond the 15 days window pursuant to Rule 260, SCACR, the Appellant complied with the requirements of the appellate rule on interlocutory motions and lower court suggested summary judgment motion in its decision; therefore, the clerk’s order of dismissal should be rescinded.

However, with the dismissal of the motions for judgment on the pleadings and summary judgment, the interlocutory order has proven itself to be a final judgment from which a successful appeal will be difficult if not impossible. Consequently, Appellate Case No. 2022-000811 was an appealable interlocutory order that should have been heard by the Court of Appeals and judged on the merits. Other than stating that it was interlocutory, the Respondents presented no issues. In fact, the Respondents have made admissions in written communications and the hearing transcripts that there were no claims against the Appellant in the complaint, of which the Court of Appeals was not informed in their motion to dismiss. It is obvious at this stage that the lower court has decided that the Appellant, Benjamin F. Goff, Sr., Trustee, is not entitled to the law. According to the law, the Appellant should not be a defendant. As in all four cases filed in the lower court by the Keep It Green organization, the landowners have been made defendants in declaratory judgment actions. With the exception of the Appellant’s case all have been dismissed for legislative immunity, claims inconsistent with South Carolina laws and the inability of the court to provide the relief sought to void and nullify a legislative by action.

RELEVANT FACTS

The Respondents Motion to Dismiss the Appeal simply because it was interlocutory did not provide any facts or evidence to dispute that this was an appealable interlocutory order. Subsequent decisions by the trial court have proven that this order has affected the merits of the case, the substantial rights of the Appellant and will prevent an appeal of a final judgment from an unjustified trial. In support of the request for by leave of the court to reinstate Appellate Case No. 2022- 000811, the Appellant states the following:

- . This intermediate appeal of the trial court Order was based on the grounds that it involved the merits of the legal action and the Appellant has suffered substantial harm to his rights and will prevents a judgment from which an appeal might be taken, if the order is not corrected until the case is over pursuant to S.C. Code Ann. § 14-3-330(1) and S.C. Code Ann. § 14-3-330(2)(a).
- . The right to appeal in this case is controlled by S.C. Code Ann. § 14-3-330 (1976 & Supp.1994). Only two of its provisions are potentially applicable to this matter. First, § 14-3-330(1) allows the appeal of an interlocutory order "involving the merits." To involve the merits, the order must "finally determine some substantial matter forming the whole or part of some cause of action or defense.
- Under S.C. Code Ann. § 14-3-330(2)(a), an order which affects a substantial right and in effect determines the action and prevents a judgment from which an appeal may be taken is immediately appealable.
- An intermediate/interlocutory order is immediately appealable only if it involves the merits of the case or affects a substantial right. S.C. Code Ann. § 14-3-330 (1976).
- The Stipulation of Dismissal pursuant to Rule 41, SCRPC between the County Council's and Respondents' lawyers that dismissed, without prejudice, any and all claims against the County Council and elected members was not signed by the Appellant.
- There are no facts stated in the Respondents' Complaint that constitutes a fairly read cause of action against the Appellant, pursuant to Rule 12(b)(6), SCRPC.
- The Order states that the court finds that Respondents' Complaint alleges facts sufficient to establish a controversy and state a cause of action for declaratory judgment; whereas, the controversy, if any, was specifically between the County Council and Respondents.
- The Order states that the Appellant was properly named as a defendant in this declaratory judgment action which is in contradiction of S.C. Code Ann. § 15-53-80.
- Admissions made by the Respondents' lawyer in an Email, a Letter and the Transcript on Record summarily states that her clients have no claims against the Appellant.
- The trial court, though informed, did not consider that the finding of a fairly read cause of action against the Appellant was directly contrary to the position of the Respondents' clients.

- The Appellant only submitted an application to rezone private property and has been designated and sanctioned by the trial court as a defendant for doing so.
- Under the Declaratory Judgment Act, S.C. Code Ann. § 15-53-80, all persons with an interest in the litigation should be made parties; therefore, Appellant is a party-in-interest as opposed to a defendant or an involuntary plaintiff in accordance with Rule 19(a)(2), SCRPC.
- Despite admissions of no claims, the trial court has kept the Appellant as a defendant to be tried for an unstated fairly read cause of action where none exists the Respondents' Complaint.
- Respondents stipulated to dismiss any and all claims against the Georgetown County Council and elected members based on legislative immunity and lack of judicial intervention.
- The Appellant and Trust are defendants who cannot provide any recovery or relief or force the Georgetown County Council to rescind a legislative action.
- With the stipulation of dismissal of the County Council, the Respondents have abandoned the requested relief of voiding and nullifying the ordinances through their litigation.

ARGUMENT

In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and -330 (1976 & Supp. 2003), and S.C. Code Ann. § 14-8-200 (Supp. 2003)); *Osprey, Inc. v. Cabana Ltd. Partnership*, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same).

By statute, an appeal from an interlocutory order is permitted in certain circumstances, including when the order is one “involving the merits . . . [or] affecting a substantial right.” S.C. Code Ann. § 14-3-330(1) and (2). Pursuant to Rule 260, SCACR and Rule 240, SCACR, the Appellant, Benjamin F. Goff, Sr., Trustee of the Benjamin F. Goff 2004 Revocable Trust, dated June 18, 2004, requests this Honorable Court to grant the Appellant’s Motion to Reinstate Appellate Case No. 2022-000811. Under S.C. Code Ann. § 14-3-330(1) and S.C. Code Ann. § 14-3-330(2)(a), the appealed Order, in this case, affected the merits and has prevented a proper judgment from being rendered in the action on a Motion for Judgment on the Pleadings and a Motion for Summary Judgment. Currently, the Appellant will be tried in the trial court for an unstated fairly read cause of action despite Respondents admissions of no claims in the Complaint against the Appellant, Benjamin F. Goff, Sr., Trustee.

An order affects a substantial right and is immediately appealable when it “(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[.]” Section 14-3-330(2). An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is

considered an interlocutory order from which no immediate appeal is allowed. *Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002). The Court of Appeals erred in its decision that Appellate Case No. 2022-000811 was not an appealable interlocutory order.

The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330 (1976 & Supp. 2003). An order generally must fall into one of several categories set forth in that statute in order to be immediately appealable. *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004); *Woodard v. Westvaco Corp.*, 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995), overruled on other grounds, *Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002); *Mid-State Distributors*, 310 S.C. at 333 n.3, 426 S.E.2d at 780 n.3.

"An appellate court may determine the question of appealability of a decision from a lower court as a matter of law." *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 571, 698 S.E.2d 856, 858 (Ct. App. 2010) (citing S.C. Code Ann. § 14-3-330 (1976 & Supp. 2009) (creating appellate jurisdiction in law cases); S.C. Code Ann. § 14-8-200(a) (Supp. 2009) (setting forth the appellate jurisdiction of the court of appeals)). "Even if not raised by the parties, this court may address the issue of appealability *ex mero motu*." *Id.*; see also *St. Francis Xavier Hosp. v. Ruscon/Abco*, 285 S.C. 584, 586, 330 S.E.2d 548, 549 (Ct. App. 1985) (providing this court can raise the issue of appealability *ex mero motu* even when no party raises any question concerning the appealability of an order).

In a well-established exception to the general rule, the courts 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). See *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) ("Pursuant to § 14-3-330(2), this Court has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.") (listing cases); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (order referring case to master in equity affects the mode of trial, a substantial right, and party waived his objection to the reference and his right to jury trial by failing to immediately appeal the order); *Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004) (purpose of immediate appeal on right to particular mode of trial is to preserve party's constitutional right to trial by jury which would otherwise be lost.)

A final judgment against the Appellant will compromise a future appeal. Moreover, the Order effectively terminated the lawsuit against the Georgetown County Council and elected members and substituted the Appellant, thus bringing the Order under paragraph S.C. Code Ann. § 14-3-330(3). S.C. Code Ann. § 14-3-430 provides that "Upon an appeal under item (3) of Section 14-3-330 the court may review any intermediate order involving the merits and necessarily affecting the order appealed from."

In essence, the Appellant's Motion to Dismiss Benjamin F. Goff, Trustee as a Defendant was to redesignate him as a party-in-interest, as required by S.C. Code Ann. § 15-53-80 of the Uniform Declaratory Judgment Act (UDJA) or an involuntary plaintiff in accordance with Rule 19(a)(2), SCRCF. It was not a motion to dismiss the case in which there were no facts sufficient for a cause of action against the Appellant. In this dismissed appeal, the Appellant is challenging

the Order denying to dismiss him as a Defendant and finding an unstated “fairly read” cause of action, where the Respondents made admissions of no claims against the Appellant.

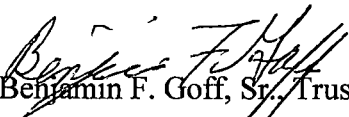
A party who does not immediately appeal an order of substitution may not appeal this interlocutory order after final judgment. See *Watts v. Copeland*, 170 S.C. 449, 456-7, 170 S.E. 780, 783 (1933). This Court has held that an interlocutory order that falls within the purview of § 14-3-330(2)(a) must be immediately appealed if it is to be considered at all, and that there is no review available after final judgment. See *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985). The order of dismissal is appealable under § 14-3-330(2)(a), and the failure to take such an immediate appeal would have barred review of the order in an appeal from a final judgment. See *Watts*, supra.

In a Stipulation of Dismissal, the trial court allowed the accused defendants, County Council and elected members, to be released and the unaccused and inadvertently or deliberately designated Appellant as a defendant and be charged with an unspecified cause of action. Consequently, the Appellant is being sued for having submitted a rezoning application that was accepted by the Planning Department, recommended by the Planning Commission and approved and adopted into ordinances by the County Council. Pursuant to Rule 201(a), SCACR, an appeal may be taken, as provided by law, from any final judgment, appealable order or decision. This order has proven to be an unjustified final judgment against the Appellant.

CONCLUSION

The Appellant’s Motion to Reinstate Appeal should be granted. In that, any and all claims in the Respondents’ Complaint have been dismissed against the County Council and elected members, who have legislative immunity and the Respondents’ Complaint does not state any claims against the Appellant. The Appellant should not have been named as a Defendant as opposed to an Involuntary Plaintiff or Party-in-Interest. The Respondents’ lawyer made admissions in written statements and the hearing transcripts that her clients have no claims against the Appellant. This intermediate Order was appealable because it has affected the merits of the case, impacted the substantial rights of the Appellant and will prevent the appeal of any final judgment after a trial. Fairness and justice require this Honorable Court to grant the Motion to Reinstate of the appeal order and subsequently dismiss the Respondents’ Complaint in its entirety.

Respectfully,


Benjamin F. Goff, Sr., Trustee, Pro Se

Enclosures: 1. Clerk’s Letter of Denial, Dated August 29, 2023; 2. Motion to Reinstate Appellate Case No. 2022-000811, Filed August 1, 2023; 3. Memorandum of Law in Support of the Motion to Reinstate, Filed August 1, 2023; 4. Remittitur, Dated January 5, 2023; 5. Court of Appeals Order, Dated December 7, 2022

cc: Cynthia Ranck Person, Esq., H. Thomas Morgan, Jr., Esq., Rachel Elizabeth Lee, Esq.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

August 29, 2023

Benjamin F. Goff, Sr.
18 Powers Farm Road
Randolph MA 02368

Re: Ernest Middleton v. Georgetown County
Appellate Case No. 2022-000811

Dear Mr. Goff:

The Court received your motion to reinstate. The Court lacks jurisdiction to consider your motion due to the sending of the remittitur on January 5, 2023. No further action will be taken on your filings.

Very truly yours,

A handwritten signature in cursive script that reads "Catherine Harrison, deputy".

CLERK

cc: Cynthia Ranck Person, Esquire
H. Thomas Morgan, Jr., Esquire
Rachel Elizabeth Lee, Esquire
Alma Y. White

Retail



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Benjamin F. Goff, Sr., Trustee
18 Powers Farm Road
Randolph, MA 02368

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Columbia, SC 29211

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