

RECEIVED

Oct 10 2023

SC Court of Appeals

APPEALABILITY MEMORANDA

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

Ct. App. Case No. 2023-00118
Civil Ct. Case No. 2021-CP-18-01400

Josue Pineda Orellana, Appellant

v.

Trident Construction, LLC, Respondent

APPEALABILITY MEMORANDA

Appellant Josue Pineda Orellana, by and through his undersigned attorney, respectfully hereby submits this Appealability Memoranda in response to The South Carolina Court of Appeals’ request for same, outlined in correspondence dated September 29, 2023.

FACTUAL/PROCEDURAL BACKGROUND

Trident Construction, LLC (“Trident”) was the general contractor hired by a commercial truck dealer and distributor, Worldwide Equipment, to build a new 37,000 square-foot facility at

78- Jedburg Road, Summerville, South Carolina. Trident supervised the construction, with was performed by various subcontractors either engaged by Trident, or by subcontractors. Appellant was an employee of a subcontractor of a subcontractor, Frank's Painting LLC, hired by Peter's Paint and Wall Covering (hired by Trident Construction)..

Appellant was assigned to install plastic on the concrete second floor to prevent paint from spraying onto the concrete floor. This was appellant's first day setting foot on the second floor of the Premises. Appellant was placing plastic down by taping down the front of the plastic and walking backwards in a squatting position as he unrolled the plastic. As appellant was moving backwards, he stepped onto a blue foam board (Dow Styrofoam Scoreboard Extruded Polystyrene Insulation with a compression strength of 25 lbs.) that was placed inside of a 2.5 feet by 3.5 feet open hole. The blue Styrofoam hard insulation had been placed in the holes (on the second floor of the Premises) by employees of Trident Construction. As Appellant stepped onto the blue foam board, the blue foam board broke and Plaintiff fell backwards and into the hole, falling approximately 14 feet, landing neck and back first onto the concrete floor below. Plaintiff suffered back fractures, a broken dorsal spine, and damaged tendons, resulting in Plaintiff being paralyzed (a paraplegic).

On August 5, 2021, appellant filed the circuit court action, naming 10 "John Doe" defendants. On May 18, 2023, appellant moved before the Dorchester County Court of Common Pleas to amend his complaint pursuant to Rules 11, 15(b), 15(c), and 37 of the South Carolina rules of Civil Procedure, requesting of the Court an order allowing appellant to substitute and add Trident Construction, LLC as the named Defendant in place of Defendant John Doe 1, alleging: no prejudice would result from granting the motion; the claims asserted in appellant's proposed amended pleading arose out of the same conduct and occurrence set forth in the original pleadings; Trident Construction had notice of the institution of said action within the period provided by law for commencement of said action; Trident Construction knew or should have known that, but for a mistake concerning the identity of the proper party, said action would have been brought against Trident Construction, and; the workers' compensation exclusivity doctrine did not apply due to the fact that appellant was not a statutory employee of Trident Construction pursuant to the SC Supreme Court's recent decision in Keene v. CNA Holdings, LLC, Opinion No. 28052, which would not be considered a retroactive application of law pursuant to Zeigler v. Eastman Chemical Company LLC (2022).

Trident Construction responded by moving the court for leave to intervene for the limited purpose of opposing appellant's motion to include Trident as a defendant in said action, alleging: the motion to amend should be denied because it would prejudice Trident Construction; the motion to amend should be denied as futile; the workers' compensation exclusivity defense barred any further claim by appellant against Trident Construction; the Keene case did not alter Trident Construction's status as a statutory employer; Trident Construction was dismissed with prejudice from the workers' compensation action, and; the statute of limitations had expired.

On May 26, 2023, the trial court granted Trident Construction's motion to intervene and denied appellant's motion to amend and substitute, adopting the arguments made by Trident Construction in their memorandum, and effectively ending any potential claim against Trident Construction. On June 5, 2023, appellant filed a motion to reconsider. On June 9, 2023, the trial court judge issued an order denying appellant's motion to reconsider. Appellant filed this appeal on July 10, 2023.

APPEALABILITY

An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in section 14-3-330 of the South Carolina Code (1976 & Supp. 2009). *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). Appellant contends the portion of the order dealing with denial of appellant's motion to amend and substitute Trident Construction for John Doe 1 is appealable under sections 14-3-330(1) and 14-3-330(2)(c) because it involves the merits and affects a substantial right by striking a pleading.

ORDER GRANTING RESPONDENT'S MOTION TO INTERVENE AND DENYING APPELLANT'S MOTION TO AMEND AND SUBSTITUTE PARTIES

Our courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability. See, e.g., *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (holding on unique facts that an order granting a motion to set aside default was immediately appealable because it had "the effect of . . . granting a motion to dismiss under Rule 12(b)(5), SCRCPP, since it ends the action as to [one party]"); *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 114-15, 682 S.E.2d 871, 874 (Ct. App. 2009) (analyzing a "motion to strike" which actually challenges a theory of recovery as a motion to dismiss under 12(b)(6) rather than as a motion to strike).

As a preliminary matter, the respondents contend the order of the circuit court is not immediately appealable because the Murphys' claims against one defendant still remain. The trial court did not grant the motion to dismiss with respect to Covil Corporation because it is a South Carolina corporation.

The respondents rely upon *State ex rel. McLeod v. C & L Corp.*, 280 S.C. 519, 313 S.E.2d 334 (Ct.App.1984), in support of their argument. In that case, the trial court granted summary judgment to two defendants during the course of the proceedings. Although an immediate appeal was not taken, after the entry of a final order, the Attorney General filed a cross appeal raising the issue of summary judgment. The two defendants argued the cross appeal should be dismissed because the summary judgment order was a final order from which an appeal had not been timely perfected. The supreme court denied the motion to dismiss and transferred the case to this court for disposition. Our opinion notes the supreme court's ruling on the motion to dismiss was binding on this court. Judge Bell, writing for this court, stated that the Attorney General's appeal

from the final order was sufficient to bring the intermediate order granting summary judgment before the court for review. The opinion states that "[w]hen multiple defendants are joined in the same action, an order dismissing some but not all of them is ordinarily not final or appealable." *Id.* at 529, 313 S.E.2d at 340.

This particular point regarding dismissal of some, but not all, multiple defendants has not been cited subsequently by our courts. The McLeod case was cited as a general related authority in *Plaza Dev. Services v. Joe Harden Builder, Inc.*, 296 S.C. 115, 370 S.E.2d 893 (Ct.App.1988). In that case, this court held that an order granting a Rule 12(b)(6), SCRPC, motion as to some but not all claims against a single defendant was not immediately appealable. However, the Plaza Development case was overruled on that point by *Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176, nt. 2 (1990). In *Link*, the supreme court noted it had previously held in *Lebovitz v. Mudd*, 289 S.C. 476, 347 S.E.2d 94 (1986) that an order granting a Rule 12(b)(6) motion as to one of multiple claims is directly appealable under S.C.Code Ann. Section 14-3-330(2) because it affects a substantial right and strikes out part of a pleading.

It is correct that the grant of the Rule 12(b)(1) motion in this case is not a final order as there is a remaining defendant. However, the practical effect of the grant of the motion is that it strikes out the Murphys' complaint with respect to the respondents. Viewing McLeod in light of *Lebovitz* and *Link*, we conclude an order granting a Rule 12 *45 motion as to some, but not all of the defendants in a case, is directly appealable under Section 14-3-330(2) because it affects a substantial right and strikes out part of a pleading.

NEXT

In *Miles v. Charleston Light & Water Co.*, 87 S.C. 254, 69 S.E. 292 (1910), the supreme court considered the defendant's appeal from an interlocutory order denying its motion to make the plaintiff's complaint more definite and certain. 87 S.C. at 255-56, 69 S.E. at 293. After noting that such an order was not immediately appealable, the court heard the appeal anyway because "appeal has also been taken from the order upon the [defendant's] demurrer, which in effect strikes out a portion of the complaint," making it appealable under the predecessor to section 14-3-330(2)(c). 87 S.C. at 257, 69 S.E. at 293 (emphasis added). In *Bowden v. Powell*, 194 S.C. 482, 10 S.E.2d 8 (1940), the supreme court considered a post-judgment appeal from a pretrial order denying a motion to strike allegations in a complaint. 194 S.C. at 484, 10 S.E.2d at 9. In holding the order was not appealable, the court quoted Harbert to draw a distinction between the order before the court and an order granting a motion to strike a pleading, which the court noted is appealable:

If the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading, and on appeal from the final judgment this court could not say there was error of law in confining the evidence and charge to the pleadings.

Id. (quoting Harbert, 74 S.C. at 16, 53 S.E. at 1002); see also *Caldwell v. McCaw*, 141 S.C. 86, 91, 139 S.E. 174, 175 (1927).

Under the reasoning of *Miles and Bowden*, an appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c). An 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.[7]

The decision we reach in this case is consistent with a recent opinion of the supreme court on an interlocutory appeal from an order granting a motion to strike class allegations: *Grazia v. South Carolina State Plastering, LLC*, Op. No. 26882 (S.C. Sup. Ct. filed Oct. 4, 2010) (Shearouse Adv. Sh. No. 40 at 13). In *Grazia*, the plaintiffs' claim for defective stucco work fell under The Notice and Opportunity to Cure Construction Dwelling Defect Act,[10] which "requires the claimant to serve written notice no later than ninety days before filing the action." Id. at 19 (emphasis in original). Neither the *Grazias* nor any member of the class complied with the notice provision before filing. Id. at 15. Even after the *Grazias* personally complied with the notice requirement, the trial court granted the defendants' motion to strike class allegations based on its conclusion as a matter of law that the Act is incompatible with class action procedure. Id. at 15, 18. Although the supreme court did not discuss the appealability of the order, it was immediately appealable.[11] By ruling as a matter of law that no class action could be filed under the Right to Cure Act, the lower court order had the effect of removing the issue of class certification from the case and preventing the *Grazias* from litigating the issue on the merits of Rule 23, SCRPC. Plaintiff alleges that this order involves the merits under section 14-3-330(1). An order "involves the merits" when it finally determines a substantial matter forming the whole or a part of some cause of action or defense. *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993).

CONCLUSION

An interlocutory order which is not governed by a specialized appealability statute may not be appealed before the entry of final judgment unless the order fits into one of the categories set forth in section 14-3-330 of the South Carolina Code.

Because the order appealed in this case both involves the merits and affects a substantial right, it is immediately appealable.

granting Appellee's motion to WHATEVER and denying Appellant's Motion to Substitute Parties WHATEVER

[5] In several cases, our courts have discussed the immediate appealability of orders denying motions to strike. See, e.g., *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000); *Bowden v. Powell*, 194 S.C. 482, 10 S.E.2d 8 (1940); *Miles v. Charleston Light & Water Co.*, 87 S.C. 254, 69 S.E. 292 (1910). We have been able to find only one other decision

addressing, under section 14-3-330(2)(c), the immediate appealability of an interlocutory order granting a motion: *Murphy v. Owens-Corning Fiberglas Corp.*, 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001), overruled on other grounds by *Farmer v. Monsanto Corp.*, 353 S.C. 553, 556-57, 579 S.E.2d 325, 327 (2003). We discuss each of these cases below.

[6] **Our courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability. See, e.g., *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (holding on unique facts that an order granting a motion to set aside default was immediately appealable because it had "the effect of . . . granting a motion to dismiss under Rule 12(b)(5), SCRPC, since it ends the action as to [one party]"); *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 114-15, 682 S.E.2d 871, 874 (Ct. App. 2009) (analyzing a "motion to strike" which actually challenges a theory of recovery as a motion to dismiss under 12(b)(6) rather than as a motion to strike).**

[7] Our holding is also supported by the supreme court's decision in *Breland*. 339 S.C. at 93, 529 S.E.2d at 13. In *Breland*, the court ruled that an order denying a motion to change venue was not immediately appealable under section 14-3-330(2)(c), stating: "Immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case." 339 S.C. at 93, 529 S.E.2d at 13. The court held that "[t]he trial court's order did not 'affect' the Defendant's right to venue in the county of its residence because any error in the order can be corrected on appeal following the trial." *Id.*

[9] In *Murphy v. Owens-Corning Fiberglas Corp.*, 550 S.E.2d 589 (S.C. Ct. App. 2001), this court looked to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c). 346 S.C. at 44-45, 550 S.E.2d at 593. Though the order granting the Rule 12(b)(1), SCRPC, motion was not a final order, the court found it immediately appealable because it had **"the practical effect . . . that it strikes out the Murphys' complaint with respect to [some but not all defendants]."** 346 S.C. at 44, 550 S.E.2d at 593.

THORNTON V. GAS CORP. Noting an order affects a substantial right, as the term is used in section 14-3-330 of the South Carolina Code, "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"

Our courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability. See, e.g., *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (holding on unique facts that an order granting a motion to set aside default was immediately appealable because it had "the effect of . . . granting a motion to dismiss under Rule 12(b)(5), SCRPC, since it ends the action as to [one party]"); *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 114-15, 682 S.E.2d 871, 874 (Ct. App. 2009) (analyzing a "motion to strike" which actually challenges a theory of recovery as a motion to dismiss under 12(b)(6) rather than as a motion to strike). We find support for this view in several opinions of our supreme court.

s/ Benjamin A. Parker
Benjamin A. Parker
3045 Ashley Phosphate Rd
North Charleston, SC 29418
P: (843) 552-6011
F: (843) 760-6840
benparker@johnpricelawfirm.com
SC Bar No: 100831

ATTORNEY FOR APPELLANT JOSUE PINEDA ORELLANA

Other Counsel of Record:

Jaan Gunnar Rannik, Esq.
Clinton Thomas Magill, Esq.
46A State Street
Charleston, SC 29401
Phone: 843.377.1871
jgr@epting-law.com ctm@epting-law.com

ATTORNEYS FOR RESPONDENT TRIDENT CONSTRUCTION, LLC