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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
In The Circuit Court

G. D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2023-01740

DANNY ROSE, Respondent,

v.

ROBERT ROSE, GLORIA ROSE-RUCH,
MARY MARGARET DOLL ROSE, and
JOHN DOES 1-99,
of whom ROBERT ROSE, GLORIA ROSE-RUCH,
and MARY MARGARET DOLL ROSE are the Appellants.

PETITION FOR *CERTIORARI*

The Court of Appeals dismissed this appeal by its Order of December 28, 2023. The Appellants filed their Petition for Rehearing on January 5, 2024. By its Order of February 16, 2024, the Court of Appeals denied rehearing.

Both Orders of the Court of Appeals cite the holding in *Grosshuesch* v. *Cramer*, 377 S.C. 12, 659 S.E.2d 112 (2008). In that case, Justice Toal, writing for the Supreme Court, stated:

> . . . the fact remains that discovery orders, <u>in general</u>, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right.
> [*Id*., 377 S.C. at ___, 659 S.E.2d at 122; *emphasis added*.]

Similarly, in *Lowndes Products, Inc.* v. *Browder*, 262 S.C. 431, 433, 205 S.E.2d 184, 185 (1974) the Supreme Court held that "ordinarily, an order denying or compelling discovery is not directly appealable." That holding cites the language of S.C. Code § 14-3-330 (the former Code Section 15-123) which states, in relevant part:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (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, . . .
>
> (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;
>
> [*Emphasis added*.]

This limitation on review of intermediate orders was stated and clarified by the Supreme Court in *Lowndes, supra:*

> The order denying discovery only determined what evidence might be elicited upon the pretrial examination of the defendant and does not have the effect of determining the scope of the issues at the trial.
>
> [*Id*., 262 S.C. 433 - 434, 205 S.E.2d 185; *emphasis added*.]

The holding of the Supreme Court in *Ex Parte Wilson*, 625 S.E.2d 205, 367 S.C. 7 (2005), cited in this Court's Order dismissing the appeal, is also on point:

> Intermediate orders involving the merits may be immediately appealed pursuant to § 14-3-330(1). An order which involves the merits is one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Mid-State Distribs., Inc.*, 310 S.C. at 334, 426 S.E.2d at 780. Interlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2). Orders affecting a substantial right "discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." *Id.* at 335 n. 4, 426 S.E.2d at 780 n. 4.
>
> [*Id*., 367 S.C. ___, 625 S.E.2d at 208; *emphasis added*.]

BACKGROUND

The Respondent Danny Rose, age 76, sold his house and placed the proceeds in an existing joint account with his son Robert Rose. Robert Rose and Gloria Rose-Ruch, Danny's daughter, also held Danny Rose's Power of Attorney. Robert withdrew funds and he and his sister Gloria made investments in their names. The only withdrawal of funds by either Appellant of was for a sum of some $16,000.00 Robert claimed as repayment for advances to his father. The Appellants maintain their father Danny knew of the investments made and allowed them.

Danny Rose filed suit claiming theft of the monies and breach of a trust relationship, fraud and related causes. The Circuit Court issued its Orders freezing the Defendants' accounts and, on May 26, 2023, granted sanctions and judgment on the pleadings as to the majority of causes of action. After a Rule 59 Motion was refused by Order on June 14th, 2023, the Appellants appealed that Order in Appellate Case No. 2023-001129. All funds, plus interest and accepting market losses, have been returned to the Respondent.

To counsel's knowledge, Appellants' former counsel conducted no discovery in this matter. He was relieved on March 2, 2023; present counsel was retained in April, 2023. Given the centrality of Danny Rose's intention in this case, discovery – specifically in the form of a deposition of the Respondent – must be undertaken for the factual issue of his intention and knowledge to be determined. Respondent's Counsel have consistently refused such discovery since present counsel's involvement.

The Appellants moved to allow discovery. The Circuit Court denied that relief, stating in relevant part:

> Plaintiff opposes the motion, arguing the discovery Defendant seeks is inextricable to the matters on appeal, and it would either force repetitive depositions (if the Court's prior order is reversed) or would be moot (if the Court's prior order and judgment is affirmed), resulting in additional and unnecessary costs to Plaintiff. Therefore, Plaintiff argues, judicial economy necessitates the issues on appeal be resolved before additional discovery is undertaken.
>
> The Court agrees with Plaintiff. It is unlikely that Plaintiff's deposition testimony would not affect the appeal. Importantly, the Court finds judicial economy is served by

allowing Defendants' appeal to be resolved. That way, all parties have a clear understanding of the matters at issue, if any.

[Order of October 30, 2023, p.2.[1]]

As stated, the Court of Appeals has denied the Appellants the right to file their Brief or argue the issue of discovery.

ARGUMENT

The quoted language of the Circuit Court Order of October 30, 2023 mis-states the procedure of this action. No future discovery as to Danny Rose can be "repetitive", since no discovery has taken place.

Secondly, the language quoted above assumes that the Order appealed from, if confirmed, ends the case. That is inaccurate. *In Metts v. Mims*, our Supreme Court held:

> Pursuant to Rule 205, the service of a notice of appeal gives the appellate court exclusive jurisdiction over the appeal. Nonetheless, this rule also provides that a trial court may proceed "with matters not affected by the appeal." Here, the contempt order resulted from Newspapers' refusal to comply with a discovery order compelling it to provide financial data relevant to petitioner's punitive damages claim. Newspapers' motion for summary judgment, however, was on the merits of petitioner's libel claim. We find the summary judgment matter was unaffected by the appeal of the contempt order. *Cf. Grosshuesch v. Cramer,* 377 S.C. 12, 31 n. 7, 659 S.E.2d 112, 122 n. 7 (2008) (where the Court noted that the trial court properly ruled on a second discovery matter involving a deposition after the parties had filed appeals from the trial court's first order because the first order dealt with the subject of initial discovery responses).
>
> *[Id.,* 384 S.C. 491, ___, 682 S.E.2d 813, 817 (2009); *emphasis in original.]*

In short, the Supreme Court in *Metts*, *supra*, allowed discovery to proceed on an un-appealed issue. Even if the Orders of the Circuit Court granting judgment on some issues are upheld on appeal, the Respondent Danny Rose has plead for, and has not waived, his right to other damages. This obviously leaves issues other than those dealt with by the above appealed judgment Order to be decided. Unappealed issues exist in this case; in line with the language of Rule 205, S.C.A.C.R.[2], discovery can proceed with matters not affected by the appeal.

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1. This Order has been submitted to the Court of Appeals as being appealed from.
2. Rule, 205, S.C.A.C.R. provides:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of *supersedeas* as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

The Petitioners note the Circuit Court's assertion in its Order language quoted above:

> The Court agrees with Plaintiff. It is unlikely that Plaintiff's deposition testimony would not affect the appeal. [*sic*]

Assuming that the lower Court has not entangled itself in double negatives[3], the Petitioners agree with the quoted language: it is <u>un</u>likely that a deposition of the Respondent Danny Rose would <u>not</u> affect the appeal. Thus the language of the October 30th Order confirms the argument of Petitioners. Discovery should be allowed as to both the matters appealed and those still held in abeyance.

The quoted language of the October 30th Order further states that a denial of discovery will allow the parties "a clear understanding of the matters at issue, of any." *Id*. The Appellants note that there has been no discovery in this matter by Appellants whatsoever. The factual basis for the Respondent's assertions of tort causes of action rest solely upon his execution of a generic verification of his complaint. There is not, nor can there be, any "clear understanding" of the issues in this case under these circumstances.

The Appellants Robert Rose and Gloria Rose-Ruch swore by their Affidavits filed in April, by their separate Affidavits filed with their Motion for discovery in September, and by that of their mother and the ex-wife of Danny Rose, Vicky Rose Smith, that the Respondent Danny Rose intended Robert Rose handle the money and make investments for Danny Rose. If that fact is established by discovery, it will have a direct effect on the pending appeal of the Order granting judgment on some causes of action, and upon any future right of the Appellants to seek Rule 60 relief from that Order.

CONCLUSION

The knowledge and intention of the Respondent Danny Rose in transferring his funds to the Respondents is the central issue in this case. As such, in the quoted language of *EX PARTE*

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3. The Appellants note that the quoted Order was drafted by counsel for the Respondent.

Wilson, supra, the denied discovery involves the merits of this case and involves a substantial right. In light of the precedent quoted above, this denial of discovery is appealable.

Danny Rose is 76 years old. The Affidavits submitted by his children and ex-wife call his rationality into serious question. The appeal now pending as to the grant of judgment will take, on past experience, one and a half to two years. Discovery needs to proceed at the earliest time.

Since the denial of discovery is appealable, the Appellants should have been allowed to set out their arguments by brief to the Appellate Court.

An Appellate Court can, of course, conclude that the Appellants are bound by the failure of their previous counsel to conduct discovery. Counsel would note that this is the harshest remedy available to any Court and should, in fairness, be avoided.

Respectfully submitted,

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March 17, 2024

Rock Hill, South Carolina