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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge
Case No.: 2022-CP-26-06296

RECEIVED

MAY 17 2024

SC Court of Appeals

Appellate Case No. *Pending*

Anna Coggeshall; Bryan Coggeshall; and Katherine CoggeshallRespondents

v.

William Bertram von Herrmann and The Von Herrmann Law Firm. Appellants.

NOTICE OF APPEAL

William Bertram von Herrmann and The Von Herrmann Law Firm appeals the order of the Honorable Kristi F. Curtis entered November 1, 2023. **See Ex. A (11.1.23 Order)**. Appellants timely filed a Motion to Alter or Amend on November 10, 2023. **Ex. B (11.10.23 Motion for Reconsideration)**. The Court denied the Motion to Alter or Amend on April 17, 2024. **Ex. C (4.17.24 Order)**. Appellants also appeal the Order denying their Motion to Reconsider.

Out of an abundance of caution, and to aid in the Court of Appeals' review, Appellants explain the background of the case and why they believe an immediate appeal is necessary under the circumstances.

Background

Respondents Anna, Bryan, and Katherine Coggeshall filed suit against Attorney William Bertram von Herrmann and his law firm, The Von Herrmann Law Firm, asserting liability for the

use and disclosure of Respondents' electronic communications that Mr. von Herrmann was provided by his client, Justin Fulmer. Respondents assert Appellants used the electronic communications to bring a lawsuit against the Respondents on Mr. Fulmer's behalf (Fulmer Action). Respondents allege Mr. Fulmer intercepted the electronic communications and Appellants, with knowledge the information was "unlawfully obtained", disseminated the material. The Fulmer Action was tried to verdict in December 2023, and is being appealed.

In the present lawsuit, Appellants originally asserted claims for violation of the South Carolina Homeland Security Act (S.C. Code Ann. § 17-30-10, *et seq.*), the Computer Fraud and Abuse Act (18 U.S.C. § 1030), and Invasion of Privacy for publicizing private affairs and for wrongful intrusion and outrage. Respondents removed the case to federal court based on the federal claim and moved to dismiss based on the defense of attorney immunity. Appellants quickly voluntarily dismissed the federal claim to deprive the federal court of jurisdiction. As a result, the federal court remanded the case and did not rule on the motion to dismiss.

On remand, the circuit court granted in part and denied in part Appellants' motion to dismiss. **Ex. A.** The court ruled that attorney immunity barred Respondents' claims for Invasion of Privacy. The court noted that the Amended Complaint made clear Attorney von Herrmann's allegedly wrongful actions took place while he was representing Mr. Fulmer. Because the Amended Complaint did not allege Respondents breached an independent duty to Appellants, or that Respondents acted in their own interest and outside the scope of representing Mr. Fulmer, Respondents were protected by the attorney-immunity defense.

However, the court found, as a matter of law on a novel issue, that the common law attorney-immunity defense did not apply to claims under the South Carolina Homeland Security Act. The court denied Respondents' motion to dismiss the Homeland Security Act claim, and

found Respondents “cannot assert the defense going forward.” Respondents timely moved for reconsideration, but the court denied that motion. *See Exs. B & C.* As outlined below, Respondents assert the orders are immediately appealable.

Argument

I. The Circuit Court’s orders are immediately appealable because they involve the merits and have the effect of striking Respondents’ defense of attorney-immunity.

The right to an appeal is governed by statute. Section 14-3-330(1) of the South Carolina Code permits appeal of “[a]ny intermediate judgment, order or decree in a law case involving the merits.” Section 14-3-330(2)(c) also permits immediate appeal of an “[a]n order affecting a substantial right made in an action when such order . . . (c) strikes out an answer or any part thereof or any pleading in any action.” An appeal can arise under either or both. *Link v. Sch. Dist. of Pickens Cnty.*, 302 S.C. 1, 6, 393 S.E.2d 176, 178 (1990).

“An order involves the merits under [section]14-3-330(1) when it finally determines some substantial matter forming the whole or part of a cause of action or defense.” *Stone v. Thompson*, 426 S.C. 291, 294, 826 S.E.2d 868, 869-70 (2019) (finding that order determining couple were common-law married was immediately appealable despite the remaining claims for divorce and equitable distribution because the determination of marriage was a substantial part of the causes of action and defenses); *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988).

“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.” *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). In determining whether an order “strikes” a material issue from the case, the court must examine “the effect of the

order, not the label given to the motion or to the order granting it.” *Id.* at 303, 705 S.E.2d at 479. “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.* at 303-04, 705 S.E.2d at 479 (emphasis added) (quoting *Bowden v. Powell*, 194 S.C. 482, 484, 10 S.E.2d 8, 9 (1940)). Ultimately, appealability is determined on a case-by-case basis. *Stone*, 426 S.C. at 295, 826 S.E.2d at 870.

No court has decided the appealability of an order denying a motion to dismiss based on the attorney-immunity defense under *Gaar v. N. Myrtle Beach Realty Co.* In addition, no appellate court has addressed the common law attorney-immunity defense’s application under the South Carolina Homeland Security Act. As a general matter, denials of motions to dismiss are usually not immediately appealable. And some courts have held that denials of motions to dismiss on other immunity claims are not immediately appealable. *Brown v. Cnty. of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005) (finding denial of individual county council members’ motion to dismiss based on absolute immunity was not immediately appealable).

Orders denying motions to dismiss based on immunity claims are usually not appealable because the order denying the motion to dismiss is not supposed to finally decide anything about a case and the litigants are free to raise the issues at a later point in the case. *Id.* (“Furthermore, the trial court’s denial of the individual council members’ motion to dismiss does not preclude the individual council members from raising the issues presented in their motion at a later point in the case.”); see *Frazier v. Badger*, 361 S.C. 94, 101, 603 S.E.2d 587, 590 (2004) (noting immunity under the Tort Claims Act must be proven at trial because it is an affirmative defense).

Considering that appealability is determined on a case-by-case basis and the court must examine the effect of the order appealed from, this Court must examine the effect of the order denying attorney-immunity's application to claims under the Homeland Security Act to determine appealability.

Here, the order is immediately appealable because it involves the merits and has the effect of striking a good defense. The order explicitly states that Appellants "cannot assert the [attorney-immunity] defense going forward." Because it prevents Appellants from asserting the attorney-immunity defense during litigation, the order has "finally determined" a substantial matter forming the whole or part of a defense and, therefore, "involves the merits" and is immediately appealable under 14-3-330(1). *See Stone*, 426 S.C. at 294, 826 S.E.2d at 869-70. In addition, because the order has the effect of striking a defense and removing the material issue from the case, it affects a substantial right, prevents the issue from being litigated on the merits and, therefore, is appealable under 14-3-330(2)(c). As stated in *Thorton*, the court's ruling that Respondents cannot assert the defense going forward is impossible to remedy in the course of a trial in this case because the evidence and issues submitted to the jury cannot extend beyond the issues in the pleadings. *Thorton*, 391 S.C. at 303-04, 705 S.E.2d at 479. This deprives the appellate court from being able to evaluate on appeal if there is an error of law confining the evidence and jury charges to the pleadings, which would not include attorney-immunity because the court explicitly stated Respondents cannot assert the defense moving forward. *Id.* Because Appellants cannot assert the defense, they are prevented from raising the issue at a later point in time in the case. Therefore, the reasoning in *Brown* is not applicable because the council members could continue to litigate the issue of their claimed immunity. Appellants are foreclosed from continuing to litigate attorney-immunity.

Moreover, this case presents novel issues on the interplay of attorney-immunity and liability under the South Carolina Homeland Security Act. Respondents are attempting to impose liability on Appellants for quintessential attorney activities—bringing a lawsuit on behalf of a client and engaging in discovery. Because the claims relate to attorney activities, discovery and litigation will include getting into attorney-client privileged and work-product doctrine protected material generated in the underlying Fulmer Case. The novelty of the issues and the dangers of discovery intruding upon privileges essential to our justice system warrants finding the issue is immediately appealable and addressing the merits.

COPELAND, STAIR, VALZ & LOVELL, LLP

May 10, 2024.

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PROOF OF SERVICE

I certify that I have served *Appellants' Notice of Appeal*, upon the parties below by electronic mail, addressed as follows:

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This 10th day of May, 2024.

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REPLY TO SC OFFICE

May 13, 2024

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SC Court of Appeals

VIA EMAIL and REGULAR MAIL

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Re: Anna Coggeshall, Bryan Coggeshall, and Katherine Coggeshall v William Bertram von Herrmann and The Von Herrmann Law Firm
Case No.: 2022-CP-26-06296
CSVL File No.: 2283-64549

Dear Ms. Kitchings:

Enclosed please find Appellants William Bertram von Herrmann and The Von Herrmann Law Firm's Notice of Appeal in the above-referenced case, together with Exhibits A through C, Proof of Service, and Appellants' service email and letter to Respondents, together with the \$250.00 filing fee. If anything further is required from Appellants at this time, please advise.

Sincerely yours,

s/Skyler C. Wilson

DOUGLAS W. MACKELCAN
SKYLER C. WILSON

SCW:tjr

Enclosures: *as stated above*

cc: Richard G. Whiting, Esq.; Steven Abrams, Esq.

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