

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jul 15 2024

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS
THE HONORABLE BENTLEY D. PRICE, CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2023-001853
CIVIL ACTION NO. 2021-CP-10-03090

Jared S. O'Connell and Harmony A. O'Connell,

Respondents,

versus

House Therapy Holdings, LLC; Amanda F. Dempsey; William T. Phillips;
Matthew B. Swain; Daniel Ravenel Company Sotheby's International Realty;
Artis Construction, LLC; Oceanaire, LLC; Hero Heating & Air;
Custom Climate Heating & Air, Inc.; P.J. Sanchez Masonry, LLC;
Donnix Construction, LLC; Guillen Carpentry, LLC; Charleston Exteriors, LLC;
Ashley Oak Contracting, LLC; H20 Pro, LLC; La Roca Masonry, LLC;
Apex Contractors, LLC; South Point Hardwood Floor, LLC; Bluetape Solutions, LLC;
Carolina Climate Control, LLC; Movar, LLC; ECL Design, LLC; and
Affordable Sprayfoam Insulation of the Carolinas, LLC,

Defendants,

and

Artis Construction, LLC is

Third-Party Plaintiff/Petitioner,

versus

Brian R. Wells, PE, LLC; Perryman Engineering, LLC; P.J. Sanchez
Masonry, LLC; Donnix Construction, LLC; Guillen Carpentry, LLC;
Charleston Exteriors, LLC; Ashley Oak Contracting, LLC; H20 Pro, LLC;
La Roca Masonry, LLC; Apex Contractors, LLC; and South Point Hardwood
Floor, LLC,

Third-Party Defendants,

and

House Therapy Holdings, LLC; Amanda F. Dempsey; William T. Phillips;
and Matthew B. Swain,

Respondents,

versus

Carolina Climate Control, LLC; and Bluetape Solutions, LLC,

Third-Party Defendants.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in dismissing the appeal of Artis Construction by only considering the title of the appealed orders which purported to deny summary judgment and not the substance of such orders which granted relief on the merits against Artis Construction in favor of the opposing parties, thus making the orders immediately appealable under S.C. CODE ANN. § 14-3-330 because the orders involved the merits and affected a substantial right?

INTRODUCTION

In this construction defect action, the Trial Court issued two orders against Artis Construction which were titled as orders denying summary judgment, but which rather granted certain relief in favor of the opposing parties and against Artis Construction. Because the orders involved the merits and affected a substantial right, particularly by determining the action and preventing a judgment from which an appeal might be taken and striking out an answer or any part thereof or any pleading in the action, Artis Construction appealed the orders to the Court of Appeals pursuant to S.C. CODE ANN. § 14-3-330(1) and (2).

The Court of Appeals dismissed the appeal, ruling that the orders on appeal were not immediately appealable. In dismissing the appeal, the Court of Appeals noted that the denial of a motion for summary judgment is not immediately appealable. The Court of Appeals undertook no further analysis of the appealed orders.

This Court has long established that the nature and effect of an order, and not its label, should be considered in determining appealability. But the Court of Appeals ignored this principle and only considered the label of the appealed orders. Had the Court of Appeals evaluated the substance of the appealed orders, it would have been readily apparent that the orders, rather than

simply denying summary judgment, instead made binding findings of fact and conclusions of law against Artis Construction which prohibit it from presenting a defense against the plaintiffs' claims and preclude its ability to pursue its cross-claims. Under Rule 242(b), SCACR, Artis Construction requests this Court to grant its Petition for Writ of Certiorari to correct this fundamental misapprehension by the Court of Appeals and allow the appeal to proceed on the merits.

STATEMENT OF THE CASE

This case arises out of alleged construction defects in a residence owned by Plaintiffs Jared S. O'Connell and Harmony A. O'Connell. The Plaintiffs purchased the property from Defendant House Therapy Holdings, LLC ("HTH"). Prior to the Plaintiffs' purchase of the residence, HTH contracted with Petitioner Artis Construction to renovate the property.

The Plaintiffs filed suit against a number of defendants for the alleged construction defects, including Artis Construction, HTH, Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain. A Fifth Amended Complaint was filed November 16, 2022. [See Fifth Am. Compl., attached as Exhibit "A" to the Memorandum Regarding Appealability filed December 21, 2023 with the Court of Appeals.] The Plaintiffs asserted claims for negligence, breach of warranties, and violation of South Carolina's Unfair Trade Practices Act against Artis Construction.

Artis Construction answered the Fifth Amended Complaint and asserted cross-claims against HTH, as well as against Dempsey, Phillips, and Swain (the "HTH Individual Defendants"), for indemnity, breach of contract, and fraud. [See Answer and Cross-Claims, attached as Exhibit "B" to the Memorandum Re: Appealability.] The cross-claims arose out of the breach of and material misrepresentations made by HTH and the HTH Individual Defendants in connection with a settlement agreement executed to resolve previous litigation between Artis Construction, HTH,

and the HTH Individual Defendants involving the renovation of the Plaintiffs' property and the same construction defects now alleged by the Plaintiffs.

On May 5, 2023, Artis Construction moved for summary judgment against HTH and the HTH Individual Defendants on its cross-claims for indemnity, breach of contract, and fraud. [See Artis Mtn. for Summary Judgment against HTH and HTH Individual Defendants, attached as Exhibit "C" to the Memorandum Re: Appealability.] On June 23, 2023, Artis Construction also moved for summary judgment on the Plaintiffs' claim for violation of the Unfair Trade Practices Act, arguing that the Plaintiffs had not presented any evidence supporting a finding that Artis Construction engaged in any unfair or deceptive act or practices which affected the public interest as required to succeed on a claim for Unfair Trade Practices. [See Artis Mtn. for Summary Judgment against Plaintiffs, attached as Exhibit "D" to the Memorandum Re: Appealability.]

A hearing was held before the Trial Court on August 15, 2023 on both motions for summary judgment. The Trial Court denied the motions from the bench. [See Hearing Transcript Excerpts attached as Exhibit "E" to the Memorandum Re: Appealability, pp. 26, ll. 18-19; 29, ll. 6-11; 34, l. 25 – 35, l. 1.]

Even though the Trial Court had simply orally denied the motions for summary judgment and had specifically instructed the Plaintiffs' counsel to submit a "short order" reflecting the same, [Hearing Tr. pp. 34, l. 25 – 35, l. 1], the Plaintiffs, as well as HTH and the HTH Individual Defendants, submitted proposed orders which included multiple findings of fact and conclusions of law which, if signed by the Trial Court, would amount to a summary judgment in favor of the Plaintiffs, HTH and the HTH Individual Defendants. Artis Construction submitted competing proposed orders which simply denied the motions for summary judgment without making any

findings of fact or conclusions of law.

With respect to Artis Construction's motion for summary judgment on the cross-claims against HTH and the HTH Individual Defendants, the Trial Court signed and entered both the proposed order submitted by HTH and the HTH Individual Defendants and the proposed order submitted by Artis Construction. [See HTH Order Denying Motion for Summary Judgment entered September 1, 2023 at 10:54 a.m., attached as Exhibit "F" to the Memorandum Re: Appealability and Artis Order Denying Motion for Summary Judgment entered September 1, 2023 at 11:00 a.m., attached as Exhibit "G" to the Memorandum Re: Appealability.]

Likewise, as to Artis Construction's motion for summary judgment on the Plaintiffs' Unfair Trade Practices Act claim, the Trial Court also signed and entered both the proposed order of the Plaintiffs and the proposed order of Artis Construction. [See Plaintiffs Order Denying Motion for Summary Judgment entered September 1, 2023 at 10:58 a.m., attached as Exhibit "H" to the Memorandum Re: Appealability and Artis Order Denying Motion for Summary Judgment as to Plaintiffs entered September 1, 2023 at 11:02 a.m., attached as Exhibit "I" to the Memorandum Re: Appealability.]

Therefore, as to each of Artis Construction's motions for summary judgment, the Trial Court had entered both short orders simply denying the motions, as well as full and complete orders rendering findings of fact and conclusions of law against Artis Construction. Due to the confusion, the Trial Court eventually entered a Form 4 Order on September 27, 2023 indicating that the proposed orders submitted by Artis Construction which were entered at 11:00 a.m. and 11:02 a.m. on September 1, 2023 were vacated. [See Form 4 Order filed September 19, 2023, attached as Exhibit "J" to the Memorandum Re: Appealability and Form 4 Order filed September

27, 2023, attached as Exhibit “K” to the Memorandum Re: Appealability.]

Therefore, on September 27, 2023, the Trial Court adopted the proposed orders submitted by the Plaintiffs and HTH and the HTH Individual Defendants. These orders did more than simply deny the motions for summary judgment of Artis Construction. Rather, the Trial Court’s orders made binding findings of fact and conclusions of law against Artis Construction which prevented Artis Construction from pursuing its cross-claims against HTH and the HTH Individual Defendants and stripped Artis Construction of its defenses to the Plaintiffs’ claims.

A. Order as to HTH and the HTH Individual Defendants.

The Trial Court’s order titled “Order Denying Motion for Summary Judgment” as to HTH and the HTH Individual Defendants [Exhibit “F”] makes the following rulings as a matter of law which preclude Artis Construction from pursuing its cross-claims for indemnity, breach of contract, and fraud:

1. The Trial Court ruled that the indemnity provision in the settlement agreement at issue is unenforceable and invalid as a matter of law under South Carolina law and therefore Artis Construction’s claims for indemnity and breach of contract fail as a matter of law [Id. at pp. 4-7; 10];
2. The Trial Court further ruled, as a matter of law, that there were no misrepresentations which breached the settlement agreement and therefore, Artis Construction’s breach of contract cross-claim failed as a matter of law on this additional basis [Id. at pp. 7, 10];
3. The Trial Court ruled that Artis Construction’s claim for fraud failed as a matter of law because it did not prove any damages [Id. at p. 9]; and
4. The Trial Court ruled that there was no basis for liability against the HTH Individual Defendants under any of Artis Construction’s causes of action as a matter of law [Id. at pp. 9-10].

In its conclusion, the Trial Court explicitly stated that as to the cross-claims against HTH and the HTH Individual Defendants, “the known facts make it clear that Artis’ claims fail as a

matter of law.” [Id. at p. 10].

B. Order as to the Plaintiffs.

The Trial Court’s order titled “Order Denying Artis Construction, LLC’s Motion for Summary Judgment as to Plaintiffs” [Exhibit “H”] makes the following binding findings of fact and conclusions of law in favor of the Plaintiffs, thus precluding Artis Construction’s ability to defend:

1. The Trial Court’s order makes multiple findings of fact predetermining the existence of construction deficiencies which resulted in damage to the Plaintiffs, including experiencing illness which forced the Plaintiffs to move out of the home due to air quality, even though the existence of construction deficiencies, causation, and damages was and continues to be a disputed issue in the case [Id. at pp. 2-3];
2. The Trial Court’s order further makes findings of fact that because Artis Construction suggested underground PVC ductwork and improperly installed the PVC ductwork, Coliform and E.Coli are now present at the Plaintiffs’ property, which factual findings are conclusive of liability and causation against Artis Construction [Id. at p. 3 (finding “improper installation of underground ductwork” causing ductwork to fill with water resulting in Plaintiffs’ illnesses); p. 5 (same factual finding)]; and
3. The Trial Court ruled that Artis Construction committed a “fraudulent and deceptive act” by installing a PVC ductwork system that could not work in the environment for the Plaintiffs’ property resulting in damage to the Plaintiffs [Id. at p. 5].

While the Trial Court’s order purports to deny Artis Construction’s motion for summary judgment on the Plaintiffs’ Unfair Trade Practices Act claim, the Trial Court’s order instead makes numerous conclusive factual findings in favor of the Plaintiff, including determinations on the existence of construction deficiencies, the existence of deceptive acts, causation, and damages which now Artis Construction is precluded from contesting at trial.

C. Denial of Reconsideration.

On October 9, 2023, Artis Construction moved the Trial Court to reconsider its order as to

HTH and the HTH Individual Defendants, as well its order as to the Plaintiffs. [See Mtns. to Reconsider, attached as Exhibits “L” and “M” to the Memorandum Re: Appealability.] In such motions, Artis Construction argued that it was inappropriate for the Trial Court to make binding factual findings and conclusions of law in orders which purported to deny Artis Construction’s motions for summary judgment. The Trial Court denied the motions on November 8, 2023. [See Order on Motions to Reconsider, attached as Exhibit “N” to the Memorandum Re: Appealability.]

D. Appeal to the Court of Appeals.

On November 30, 2023, Artis Construction appealed the Trial Court’s orders on summary judgment as to HTH and the HTH Individual Defendants, as well as to the Plaintiffs, to the Court of Appeals. In the Notice of Appeal, Artis Construction stated that the orders were immediately appealable because such orders “involv[ed] the merits,” S.C. CODE ANN. § 14-3- 330(1), and “affect[ed] a substantial right,” particularly because such orders (1) “in effect determin[e]d the action and prevent[ed] a judgment from which an appeal might be taken or discontinu[e]d the action” and (2) “[struck] out an answer or any part thereof or any pleading in any action.” § 14-3-330(2).

On December 12, 2023, the Court of Appeals requested the parties to submit memoranda addressing the issue of appealability. On December 21, 2023, Artis Construction submitted its Memorandum Regarding Appealability per the Court of Appeals’ instructions. On December 27, 2023, the Plaintiffs submitted their Memorandum and also filed a Motion to Dismiss Appeal. HTH and the HTH Individual Defendants did not submit any memorandum to the Court of Appeals regarding appealability. Artis Construction submitted its Return to the Plaintiffs’ Motion to Dismiss Appeal on January 2, 2024.

On March 21, 2024, the Court of Appeals dismissed the appeal, concluding that the appealed orders regarding summary judgment were not immediately appealable. In doing so, the Court of Appeals observed the principle that the denial of a motion for summary judgment is not immediately appealable.

On April 5, 2024, Artis Construction filed a Petition for Rehearing of the Court of Appeals' order dismissing the appeal. In its Petition, Artis Construction urged the Court of Appeals to reconsider its decision because the court failed to consider the substance of the appealed orders - which granted certain relief on the merits in favor of HTH, the HTH Individual Defendants, and the Plaintiffs – and instead only considered the title of the orders.

The Court of Appeals denied the Petition for Rehearing on June 14, 2024. Artis Construction now submits its Petition for Writ of Certiorari to this Court seeking review of the Court of Appeals' erroneous dismissal of its appeal.

ARGUMENT

The Court of Appeals erred in dismissing the appeal of Artis Construction by only considering the title of the appealed orders which purported to deny summary judgment and not the substance of such orders which granted relief on the merits against Artis Construction in favor of the opposing parties, thus making the orders immediately appealable under S.C. CODE ANN. § 14-3-330 because the orders involved the merits and affected a substantial right.

The Trial Court's orders which purport to deny Artis Construction's motions for summary judgment are immediately appealable because such orders make binding findings of fact and conclusions of law against Artis Construction which preclude its ability to pursue its cross-claims against HTH and the HTH Individual Defendants and prohibit it from presenting a defense against the claims of the Plaintiffs. Accordingly, the appealed orders are immediately appealable because such orders involve the merits and affect the substantial rights of Artis Construction.

“The determination of whether a trial court's order is immediately appealable is governed by statute.” Morrow v. Fundamental Long–Term Care Holdings, LLC, 412 S.C. 534, 537, 773 S.E.2d 144, 145 (2015). Absent a specialized statute, S.C. CODE ANN. § 14-3-330 grants the appellate courts jurisdiction over appeals from:

(1) Any intermediate judgment, order or decree in a law case involving the merits . . . ; [and]

(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.

Id.

South Carolina appellate courts decide whether an order is immediately appealable by examining the nature and effect of the order to determine whether the order fits S.C. CODE ANN. § 14-3-330’s parameters. Morrow, 412 S.C. at 539-40, 773 S.E.2d at 147. Nothing in the text or application of § 14-3-330 excludes any one procedural variety of order from its scope. An appellate court’s review of a circuit court order “is not constrained by how the order is styled.” Id. at 539, 773 S.E.2d at 147. Instead, the statute’s terms look to an order’s substance – whether the order “affect[s] a substantial right” and is thus immediately appealable. S.C. CODE ANN. § 14-3-330(2).

Consequently, because the appealability of an order hinges on its “nature and effect” rather than on its title, Tillman v. Tillman, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017), “the question of whether an order is immediately appealable is determined on a case-by-case basis.” Stone v. Thompson, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019); see also Wetzel v. Woodside Dev. Ltd. P’ship, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (noting courts must consider the *effect* of the order, not its label, in determining appealability). Courts must evaluate “the particular

circumstances” of each order and case to decide an order’s appealability. See Stone, 426 S.C. at 295, 826 S.E.2d at 870.

In dismissing the appeal, the Court of Appeals ignored these established principles, did not evaluate the substance of the appealed orders, and only considered the title of the orders. The Trial Court’s orders in this case may be labeled as a denial of a motion for summary judgment, but the label does not reflect the true nature of the appealed orders. The orders instead grant summary judgment against Artis Construction and in favor of HTH, the HTH Individual Defendants, and the Plaintiffs. Because the effect of the orders is to grant summary judgment, they are immediately appealable. See Atl. Specialty Ins. Co. v. City of Coll. Park, 357 Ga. App. 556, 559 n.5, 851 S.E.2d 189, 192 n.5 (2020), rev'd on other grounds, 313 Ga. 294, 869 S.E.2d 492 (2022) (holding that although the trial court's order by its express terms denied summary judgment and therefore was interlocutory, review of the order's substance revealed that the order appealed from was more in line with that of a declaratory judgment ruling which in substance granted judgment as a matter of law for which appellant was authorized to seek a direct and immediate appeal).

In its order as to HTH and the HTH Individual Defendants, the Trial Court does not merely deny Artis Construction’s motion for summary judgment. The Trial Court instead ruled as a matter of law that (1) the indemnity provision in the settlement agreement which Artis Construction sought to enforce is unenforceable and invalid; (2) Artis Construction cannot recover on its claim for breach of the settlement agreement as a matter of law; (3) the fraud claim of Artis Construction fails as a matter of law because it did not prove damages; and (4) there was no basis for liability against the HTH Individual Defendants. [Exhibit “F” to the Memorandum Re: Appealability.]

The Trial Court’s order as to HTH and the HTH Individual Defendants finds in favor of

these defendants on the entirety of Artis Construction's cross-claims for indemnity, breach of contract, and fraud as a matter of law. The effect of the Trial Court's order is to determine Artis Construction's cross-claims on the merits and strike the cross-claims, which rulings are immediately appealable under S.C. CODE ANN. § 14-3-330(1), (2)(a), and (2)(c). See Stone, 426 S.C. at 294, 826 S.E.2d at 869-70 ("An order involves the merits under § 14-3-330(1) when it finally determines some substantial matter forming the whole or part of a cause of action or defense."); Lebovitz v. Mudd, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986) (holding an order striking out part of a pleading is immediately appealable); Harbert v. Atlanta & C. Air Line Ry. Co., 74 S.C. 13, 53 S.E. 1001, 1002 (1906) ("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.").

While the Trial Court's order as to HTH and the HTH Individual Defendants may purport to be a denial of a motion for summary judgment, the order in fact grants summary judgment to these defendants on the cross-claims of Artis Construction because the Trial Court finally determined substantial matters forming Artis Construction's cross-claims. See Stone, 426 S.C. at 295, 826 S.E.2d at 870 (concluding lower court's determination of common law marriage was immediately appealable where the court weighed the evidence and finally determined a substantial matter forming the claims for divorce and equitable distribution). The grant of a summary judgment is immediately appealable. Link v. Sch. Dist. of Pickens Cty., 302 S.C. 1, 6, 393 S.E.2d 176, 178-79 (1990).

Likewise, the Trial Court's order as to the Plaintiffs does not merely deny Artis Construction's motion for summary judgment on the Unfair Trade Practices Act claim, but instead makes numerous factual determinations as a matter of law that construction deficiencies exist, that Artis Construction improperly completed the construction work, that Artis Construction acted fraudulently and deceptively, and that the acts of Artis Construction caused the construction deficiencies and the Plaintiffs' damages. These were disputed factual issues that were to be determined at trial, but now the Trial Court has ruled upon and determined these factual disputes as a matter of law, in effect granting summary judgment to the Plaintiffs on these issues of fact. See id. at 6, 393 S.E.2d at 178–79 (observing an order granting partial summary judgment may be appealable under either the “involving the merits” or “substantial right” categories of section 14–3–330(1) and (2)(c)).

The Trial Court's rulings against Artis Construction on the disputed factual issues involve the merits, determine substantial matters forming the basis of the Plaintiffs' action against Artis Construction, and strike Artis Construction's defenses to the Plaintiffs' claims. By making these rulings, including that Artis Construction acted deceptively, the Trial Court has predetermined that Artis Construction is liable for a violation of the Unfair Trade Practices Act which exposes Artis Construction to treble damages without an opportunity to present a defense. See S.C. CODE ANN. § 39-5-140(a) (providing that “[i]f the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court shall award three times the actual damages sustained . . .”).

Under the Trial Court's order, Artis Construction is precluded from defending against the Plaintiffs' causes of action due to the binding factual findings made by the court. See S.C. CODE

ANN. § 14-3-330(1), (2)(a), and (2)(c); see also Nauful v. Milligan, 258 S.C. 139, 143, 187 S.E.2d 511, 513 (1972) (finding lower court's interlocutory determination that defenses interposed by defendant were without merit was immediately appealable). For this reason, the Trial Court's order as to the Plaintiffs is also immediately appealable.

CONCLUSION

For the reasons set forth herein, Petitioner Artis Construction respectfully requests that the Court grant its Petition for Writ of Certiorari, reverse the Court of Appeals' dismissal of the appeal, determine that the appealed orders are immediately appealable under S.C. CODE ANN. § 14-3-330, remand the case to the Court of Appeals, and order that the appeal proceed on the merits.

Respectfully submitted,

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