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SC Court of Appeals

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

Appellate Case No. 2024-000786

Anna Coggeshall; Bryan Coggeshall; and Katherine Coggeshall .....Respondents

v.

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

Appellants' Petition for Rehearing

Appellants petition this Court to rehear its Order dismissing the appeal as interlocutory, and ask it to take up this novel issue of law as a result of the lower court's incorrect ruling at the motion to dismiss stage that the common law defense of attorney immunity—which is fundamental to the functioning and operation of our judicial system—is abrogated by implication in a statute that is silent on its effect on the common law, and preventing Appellants from asserting the defense moving forward.

Introduction

This appeal involves a claim arising under the South Carolina Homeland Security Act (the Act) against an attorney for actions taken in the scope of the attorney's representation of a client in litigation, raising the novel issue of whether our common law attorney-immunity defense applies to shield an attorney against liability for claims under the Act for the disclosure or use of allegedly

intercepted electronic communications. The defense does apply to claims under the Act. Appellants raised this novel issue to the circuit court via motion to dismiss, but the circuit court disagreed and denied that aspect of the motion. Yet the circuit court went further, ruling that Appellants "cannot assert the defense going forward." This is why the circuit court's order is immediately appealable and why this Court should hear the appeal rather than dismissing it.

Background

Respondents sued Appellants asserting liability for the use and disclosure of Respondents' electronic communications that Appellants were provided by their client, Justin Fulmer, who shares a daughter with Respondent Anna. Respondents allege Mr. Fulmer intercepted the electronic communications and Appellants, with knowledge the information was "unlawfully obtained", disseminated the material. This Court addressed the interception in the Fulmer Action. ***See* Resp. MTD, Ex. 3**. The Fulmer Action was tried to verdict in December 2023, and is being appealed.

Respondents moved to dismiss the case based on attorney immunity and the circuit court granted that motion in part and denied it in part. **Ex. A to Return to MTD**. The only surviving claim was Respondents' claim under the S.C. Homeland Security Act (Act) for using or disclosing intercepted communications. As a matter of law on a novel issue, the court ruled attorney-immunity does not apply to claims under the Act, and found Appellants "cannot assert the defense going forward." ***See* Exs. B & C to Return to MTD.** Appellants timely appealed the order, primarily based on the troubling finding preventing Appellants from asserting the defense going forward.

Respondents moved to dismiss the appeal, arguing that the orders are not immediately appealable. Appellants responded, asserting the holding that they could not assert the defense

moving forward made the order immediately appealable. The Court granted Respondents' motion to dismiss on August 14, 2024, by summary reference to authorities without an express opinion on the effect of the circuit court barring Appellants from asserting the attorney immunity defense. Appellants respectfully petition this Court to rehear the matter and take up the appeal.

Argument

I. This Court should rehear its August 14, 2024 Order because it overlooked or misapprehended the effect of the circuit court's order barring Appellants from asserting the attorney immunity defense.

This Court's order recognizes that the right to appeal an interlocutory order is governed by section 14-3-330 of the South Carolina Code, but notes that "the denial of a motion to dismiss is not immediately appealable under section 14-3-330." Respectfully, this Court has overlooked the effect of the circuit court's order and is relying on the name given to it rather than its substance.

This Court is bound to examine the effect of an interlocutory order and not the label given to it. *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303, 705 S.E.2d 475, 479 (Ct. App. 2011). Our supreme court has reaffirmed this principle as recently as 2015. *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 147 (2015) (citing *Thornton* and holding the court is free to evaluate the trial court's order for appealability regardless of what the order says).

Interestingly, the circumstances in *Morrow* are remarkably similar to this appeal, and support a finding the order is immediately appealable. In *Morrow*, a nursing home resident sued a nursing home and its parent entities when the resident sustained injuries at the nursing home. *Id.* at 535-36, 773 S.E.2d at 144-45. The parent entities moved to bifurcate trial, which the trial court granted, and stayed trial and discovery against the parent entities while the claims against the nursing home moved forward. *Id.* at 536, 773 S.E.2d at 145. The order, however, also noted that

the claims against the parent entities could only proceed if the plaintiff was successful against the nursing home. *Id.* The plaintiff appealed the order bifurcating trial. *Id.* A single judge of the Court of Appeals dismissed the appeal after finding an order bifurcating trial was not immediately appealable. *Id.* The plaintiff petitioned for rehearing and three judge panel of the court of appeals denied the petition. *Id.*

The supreme court, however, granted writ of certiorari and reversed the court of appeals. The supreme court recognized the line of cases holding that an order bifurcating trial is not immediately appealable. *Id.* at 540, 773 S.E.2d at 147. But the court examined the effect of the order and found it affected a substantial right because the circuit court's ruling misunderstood the claims against the parent entities—the circuit court's finding the plaintiff could proceed against the parent entities only if successful against the nursing home was based on a theory of vicarious liability and overlooked that plaintiff was also proceeding on a theory of direct corporate liability. *Id.* at 538-39, 773 S.E.2d at 146. Despite its name, the effect of the order implicated a substantial right and was immediately appealable. *Id.* at 539, 773 S.E.2d 146. As a result, the supreme court reversed the court of appeals' order dismissing the case and remanded for a determination on the merits of the appeal. *Id.* at 540, 773 S.E.2d at 147.

Following *Morrow*'s guidance, this Court should examine the effect of the circuit court's order and not the order's name. By its summary ruling, this Court appears to be ruling based on the name of the order: denial of a motion to dismiss. This Court acknowledges that a denial of a motion to dismiss is not immediately appealable, and notes the denial of a motion to dismiss does not establish the law of the case and the issue can be raised again later. The Court does not, however, address the effect of the order barring Appellants from asserting the defense of attorney-immunity moving forward. Thus, the Court's reference to only the name of the circuit court's order

appears to be a ruling based on the name not the effect of the order. If instead the Court examined the effect of the order, the order should be immediately appealable under the statute and *Morrow*'s guidance because the order affects a substantial right by removing the attorney-immunity defense from litigation and *attempts* to establish the law of the case by barring Appellants from asserting the defense moving forward. As argued in Appellants' notice of appeal and in Return to the Motion to Dismiss, incorporated herein by reference, the circuit court's order affects a substantial right and is immediately appealable under section 14-3-330.

Certainly, although an order denying a motion to dismiss is not *supposed* to establish the law of case and the issues can be raised later, the order at issue *purports* to establish the law of the case by finding the Act abrogated the common law attorney immunity defense and barring Appellants from raising it later. Without question, the language of the order strikes out a defense, affects a substantial right, and is immediately appealable.

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 claim relates 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—which is currently on appeal before this Court. The novelty of the issues and the dangers of discovery intruding upon privileges essential to the functioning of our justice system warrants finding the orders are immediately appealable and addressing the merits.

Further, our courts have previously addressed novel issues involved in an appeal, despite dismissing an order as not immediately appealable. *See Ex parte Wilson*, 367 S.C. 7, 14, 625 S.E.2d

205, 208 (2005). *Wilson* involved an appeal of an order quashing a subpoena duces tecum and the scope of discovery under Rule 69, SCRCP. *Id.* at 11, 625 S.E.2d at 207. Our supreme court determined the order on the subpoena duces tecum was not immediately appealable under section 14-3-330. *Id.* at 13-14, 625 S.E.2d at 208. However, the court addressed the novel issue of discovery under Rule 69, SCRCP, in the interest of judicial economy. *Id.* at 14, 625 S.E.2d at 208. ("Although we dismiss the order as not immediately appealable, we address this novel issue in the interest of judicial economy.").

Judicial economy favors ruling on the Act's effect on the common-law attorney immunity defense regardless of appealability. First, judicial economy favors ruling on the issue because the appeal is already before the court of appeals, and it is a novel threshold issue to imposing liability. If the defense applies under the Act, then the case should be dismissed, and the parties do not need to spend any time, effort, or funds to litigate the issue any further.

If this Court's ruling dismissing the appeal has the effect of upholding the circuit court's ruling that Appellants cannot assert the defense going forward, then the parties will need to spend time, effort, and funds litigating the entire case through summary judgment or trial, without developing the facts or arguments on the defense, before Appellants can appeal. If, on the subsequent appeal, it is determined that the defense applies and Appellants should have been allowed to develop it through litigation or that it results in the case being dismissed, then the parties and the judiciary will have wasted time and resources litigating the case before the subsequent appeal.

Ultimately, Appellants assert this Court overlooked the effect of the circuit court's order that affects a substantial right (removing a valid defense) and, instead, focused on the name of the order (denying a motion to dismiss) and generally applicable law noting that a denial of a motion

to dismiss does not establish the law of the case. The language of the order makes it immediately appealable, not its name. Regardless, notions of judicial economy support addressing the novel question now, before the parties and the circuit court waste their resources litigating a case that will eventually find its way back on appeal.

II. If the effect of this Court's order dismissing the appeal is intended to suggest that Respondents can continue to advance the attorney-immunity defense, this Court should make that ruling more apparent because it will save the parties from future disputes over the defense's application to the case.

This Court's summary ruling notes that denials of motions to dismiss do not establish the law of the case and the issues can be raised later in the litigation. In the part in which it denied Appellants' motion to dismiss, the circuit court analyzed the application of the Act to the attorney-immunity defense, found it abrogated the defense, and barred Appellants from asserting it further.

If this Court's ruling is that a denial of a motion to dismiss does not prevent a litigant from raising the issue later in litigation, it follows that Appellants are not prevented from litigating attorney immunity's application under the Act, because that ruling was contained in the portion of the circuit court's order denying the motion to dismiss. This holding, however, would be contrary to the circuit court order's express language barring Appellants from asserting the defense moving forward.

Considering the above, Appellants will read this Court's order as permitting them to continue to assert and litigate attorney immunity in the case, including asserting it in an answer and moving for summary judgment on that ground. Respondents will likely dispute Appellants' ability to do so and tout the circuit court's prior order. Thus, a more explicit ruling on that issue, i.e., stating Appellants can assert the defense, would save the parties time and effort fighting over continued reference to the defense. In addition, this appeal, even in its current procedural posture, would be a great opportunity to educate the bench and bar on how the principle "denials of motions

to dismiss do not establish the law of the case" affects circuit court orders that make explicit rulings on issues when denying a motion to dismiss.

Conclusion

This Court should rehear its August 14 Order dismissing the appeal, because it overlooked or misapprehended the effect of the circuit court's order finally determining a defense and, instead, focused on the name of the order and general principles regarding the effect of a denial of a motion to dismiss. In the alternative, if this Court's reference to law that a denial of a motion to dismiss does not establish the law of the case and the issues can continue to be litigated is intended to permit Appellants to assert attorney immunity after remittitur—how Appellants will interpret the Order and contrary to the circuit court's explicit ruling—this Court should rehear its August 14 Order and make that ruling explicit rather than implied.

COPELAND, STAIR, VALZ & LOVELL, LLP

August 28, 2024.

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PROOF OF SERVICE

I certify that I have served ***Appellants' Petition for Rehearing***, upon the parties below by electronic mail, addressed as follows:

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This 28th day of August, 2024.

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Subject: Coggeshall v. von Herrmann; Appellate Case No. 2024-000786; CSVL File No.: 64549
Date: Wednesday, August 28, 2024 1:22:00 PM
Attachments: image001.png
Petition for Rehearing.pdf

Good afternoon everyone,

With the attached, we are providing Respondents' with a copy of Appellants' Petition for Rehearing in this case, which is being filed today. You will be copied on our email to the Court when we file the Petition.

Thank you and best regards,

COPELAND STAIR VALZ & LOVELL LLP

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August 28, 2024

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Re: Anna Coggeshall, Bryan Coggeshall, and Katherine Coggeshall (*Respondents*) v. William Bertram von Herrmann and The Von Herrmann Law Firm (*Appellants*)
Appellate Case No. 2024-000786
State Case No.: 2022-CP-26-06296
CSVL File No.: 2283-64549

Dear Ms. Kitchings:

Enclosed for filing, please find Appellants William Bertram von Herrmann and The Von Herrmann Law Firm's Petition for Rehearing in the above-referenced case, together with Proof of Service, and Appellants' service email to Respondents. A $50.00 check for the filing fee will follow by regular mail. If anything further is required from Appellants at this time, please advise. By copy of this letter, we are again providing the Petition to Respondents' counsel, and advising of our communication with the Court.

Sincerely yours,

s/Skyler C. Wilson

DOUGLAS W. MACKELCAN
SKYLER C. WILSON

SCW:tjr
Enclosures: *as stated above*
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