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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2024-001997
Circuit Court Case No. 2022-CP-40-01265

Sarah J. Plant and Parker Plant, ... Plaintiffs,

v.

Avon Products, Inc.; Amaco, LLC; American Art Clay Co. Inc.; The Bargain Barn, LLC; Beacon CMP Corporation; Belk, Inc.; Block Drug Company, Inc.; Brenntag North America, Inc.; Brenntag Specialties, LLC; Bristol-Myers Squibb Company; Chattem, Inc.; Colgate-Palmolive Company; Color Techniques, Inc.; Conopco, Inc.; Coty Inc.; Dana Classic Fragrances, Inc.; Dillard's, Inc.; Dollar General Corporation; Elizabeth Arden, Inc.; Estee Lauder Inc.; Estee Lauder International, Inc.; The Estee Lauder Companies Inc.; Hamrick's Incorporated; Highwater Clays, Inc.; Houbigant, Inc.; IMI Fabi (Diana) LLC; IMI Fabi (USA) Inc.; IMI Fabi, LLC; Ingles Markets, Incorporated; L'Oreal USA, Inc.; L'Oreal USA Products, Inc.; Lowcountry Grocers LLC; Martin Himmel Inc.; May Kay Inc.; Maybelline LLC; Noxell Corporation; Pfizer Inc.; R.T. Vanderbilt Holding Company, Inc.; Revlon Consumer Products Corporation; Revlon, Inc.; Rite Aid of South Carolina, Inc.; Southeastern Grocers, Inc.; Topco Associates, LLC; Vanderbilt Minerals, LLC; Variety Wholesalers, Inc.; Variety Wholesalers, Inc.; Vi-Jon, LLC; Walgreen Co.; Walmart, Inc.; Whittaker, Clark & Daniels, Inc.; Winn-Dixie Stores, Inc.; Yves Saint Laurent America, Inc. .... Defendants,

of which

IMI Fabi (Diana) LLC; IMI Fabi (USA) Inc.; and IMI Fabi, LLC are the... Appellants.

PETITION FOR REHEARING OF *SUA SPONTE* DISMISSAL ORDER AND SUGGESTION OF REHEARING *EN BANC*

INTRODUCTION

This is an appeal of an order that vacates a defense verdict following a jury trial and orders a new trial. The order says so in its caption: "Order Granting Plaintiffs' Motion for Relief from Judgment Under SCRCP 60(b) and Motion for New Trial." (Order at 1.) It says so again in its conclusion: "For those reasons, Plaintiffs' Motion for Relief from Judgment under SCRCP 60(b) and Motion for a New Trial are GRANTED." (*Id.* at 20 (all capitals supplied by trial court).) There is no mistaking that this is an order that grants a new trial.

The appellate statute directly states that such an order is immediately appealable: "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal (2) an order affecting a substantial right made in any action when such order (b) grants or refuses a new trial." S.C. Code Ann. § 14-3-330(2)(b) (cleaned up).

An on-point statute unambiguously authorizes the IMI Fabi defendants to file this appeal. Accordingly, the Court's *sua sponte* order dismissing this appeal is wrong as a matter of law and should be reheard and vacated.

BACKGROUND

Defense Verdict at Trial for IMI Fabi Entities The plaintiffs sued dozens of defendants for damages associated with Ms. Plant's diagnosis of mesothelioma. On February 23, 2023, the circuit court began a jury trial in this matter that ended on March 3, 2023. Only a handful of defendants remained for trial, and even fewer remained for the verdict. During the trial, the plaintiffs voluntarily dismissed IMI Fabi USA, Inc., leaving only three defendants for the verdict: IMI Fabi (Diana), LLC; IMI Fabi, LLC; and Whittaker, Clark & Daniels, Inc.[1]

[1] The order on appeal suggests that it applies to all three IMI Fabi entities. However, the plaintiffs voluntarily dismissed IMI Fabi USA, Inc., from the case before the jury rendered its verdict, so it cannot possibly be subject to a new-trial order, as it is no longer in the case.

The jury returned a split verdict. It entered a complete defense verdict in favor of IMI Fabi (Diana), LLC, and IMI Fabi, LLC. It also entered a verdict in favor of the plaintiffs for approximately $29 million against Whittaker, Clark & Daniels, Inc. The plaintiffs did not appeal anything related to the verdict, the trial, or any of the underlying proceedings. Whittaker, Clark & Daniels filed for bankruptcy shortly after the verdict was rendered.[2]

Contrived New Trial Motion Filed. On March 1, 2024—363 days after the jury returned its verdict, and with the federal courts rejecting efforts to disrupt the Whittaker, Clark & Daniels bankruptcy—the plaintiffs filed a motion for a new trial against the remaining IMI Fabi defendants: IMI Fabi (Diana), LLC; and IMI Fabi, LLC. Their basis: allegedly deficient discovery responses from over a year earlier.

The plaintiffs' arguments fail as a matter of settled South Carolina law, and the IMI Fabi entities explained this in great detail in their opposition filings. *See generally* IMI Fabi filings to the circuit court on April 23, 2024; July 29, 2024; and September 16, 2024 (all citing, *inter alia*, *Raby Constr., LLP v. Orr*, 358 S.C. 10, 21 n.5, 594 S.E.2d 478, 483 n.5 (2004) (holding that "[a]llegations of perjury, failure to produce requested discovery, or use of forged documents amount only to intrinsic fraud" and provide no basis for vacating a verdict and ordering a new trial)).

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[2] The bankruptcy filing was preceded by the circuit court's appointment of a receiver over Whittaker, Clark & Daniels a week after the verdict. The receiver attempted to intervene and dismiss the bankruptcy, claiming that he alone could make decisions for Whittaker, Clark & Daniels, a New Jersey company. This argument was rejected by the Bankruptcy Court and the United States District Court in the District of New Jersey. *In re Whittaker, Clark & Daniels, Inc.*, Case No. 23-13575 (MBK), 2023 Bankr. LEXIS 1600 (Bankr. D.N.J. June 20, 2023); *Protopapas v. Whittaker, Clark & Daniels, Inc.*, Case No. 23-4151 (ZNQ), 2024 U.S. Dist. LEXIS 97270 (D.N.J. May 31, 2024). The receiver has appealed those rulings to the Third Circuit.

The plaintiffs' argument was so demonstrably improper under South Carolina law that the trial court held three hearings on the motion, during which the court repeatedly invited the plaintiffs to supplement their submissions with any additional arguments. Despite being given multiple chances, the plaintiffs still today have never identified any viable legal argument in support of their motion for a new trial.

Nevertheless, the circuit court granted the motion, stating that allegedly defective discovery responses amount to extrinsic fraud requiring a new trial—a position that the trial judge took when she was on the Supreme Court, but which the Supreme Court itself expressly rejected. *Compare Aaron v. Mahl*, 381 S.C. 585, 593, 674 S.E.2d 482, 486 (2009) (holding "allegations that a party failed to disclose documents generally amount to intrinsic, rather than extrinsic, fraud") (4-1 majority opinion), *with id.* at 596, 674 S.E.2d at 488 (arguing in dissent that "repeatedly failing to disclose the Collection Agreement constituted extrinsic fraud") (Toal, C.J., dissenting). This appeal followed.

***Sua Sponte* Dismissal.** The IMI Fabi entities noticed this appeal on November 21, 2024. Less than two weeks later, the Court issued a *sua sponte* dismissal. That order is puzzling, not only because it came on the Court's own initiative, but also because it appears to be based on assumptions by the Court that are unsupported by the notice of appeal, which is presently the only record before the Court.

The dismissal order is only three sentences. It cites two cases—one doesn't involve an order granting a new trial, while the other is from 1961 and has been deemed bad law. And the dismissal order contains no explanation as to why the Court thinks that South Carolina Code § 14-3-330(2)(b)—a directly-on-point statute—does not authorize this appeal. To the contrary, this appeal is expressly authorized by law, and it should be reinstated accordingly.

STANDARD OF REVIEW

Rule 221(a), SCACR, provides that a petition for rehearing should be granted when the initial ruling has "overlooked or misapprehended" relevant information or law. Such is the case here, as discussed below.

ARGUMENT

I. South Carolina Code § 14-3-330(2)(b) is directly on-point and authorizes this appeal.

It is impossible to square the *sua sponte* dismissal order with the controlling appellate statute. The order on appeal vacates a jury's defense verdict and orders a new trial. As a matter of law, such an order is immediately appealable, and the appellate statute expressly says so: "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal (2) an order affecting a substantial right made in any action when such order (b) grants or refuses a new trial." S.C. Code Ann. § 14-3-330(2)(b) (cleaned up).

When, as here, a statute's language is clear, the Court must enforce the statute as it is written. *See, e.g.*, *Rainey v. Haley*, 404 S.C. 320, 323, 745 S.E.2d 81, 83 (2013) (holding that when the words in a statute are "clear and definite," the Judiciary "has no right to impose another meaning" (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000))); *Hamilton v. Fulgham (In re Nov. 4, 2008 Bluffton Town Council Election)*, 385 S.C. 632, 639, 686 S.E.2d 683, 687 (2009) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning.").

The order below grants a new trial. The plain language of the appellate statute provides that such orders are immediately appealable, and there is no room for any other interpretation. The *sua sponte* dismissal is wrong as a matter of law and should be reconsidered accordingly.

II. The cases cited in the *sua sponte* dismissal order do not support dismissing this appeal.

Not only does the *sua sponte* dismissal order run contrary to the controlling appellate statute, the authorities cited in the order do not support dismissal.

The first case cited in the dismissal order is *Pocisk v. Sea Coast Construction of Beaufort*, 380 S.C. 584, 671 S.E.2d 98 (Ct. App. 2008). There, the Court held that a Rule 60(b) order setting aside a consent judgment was not immediately appealable. But that ruling is irrelevant here, as the *Pocisk* Court specifically explained why South Carolina Code § 14-3-330(2)(b) was not triggered in that case: "The order here, as with the order in *Pioneer Associates* [*v. Ticor Title Ins. Co.*, 300 S.C. 346, 387 S.E.2d 711 (Ct. App. 1989)], does not grant a 'new' trial ***<u>because there has not been a trial yet in the case</u>***." 380 S.C. at 588, 671 S.E.2d at 101 (emphasis added). This is obviously not applicable to the instant appeal, where there already has been a weeklong jury trial that resulted in a defense verdict for the IMI Fabi entities.

The other is *Donkle v. Forster*, 238 S.C. 90, 92, 119 S.E.2d 231, 232 (1961), which the dismissal order cited for the following proposition: "It is well settled, under the decisions of this Court, that an order granting or refusing a new trial when based solely on errors of law is subject to review by this Court, but when the order is based upon questions of fact, or upon questions of both law and fact, it is not appealable." There are multiple errors with this.

For one, this is ***<u>no longer the law</u>***. Nearly 50 years ago, the South Carolina Supreme Court erased the "law v. fact" distinction: "While the statement in our decisions, that an order granting a new trial upon the facts is not appealable, is not correct in the sense that an appeal will not lie, it is correct in the sense that such an order based upon conflicting testimony will not be disturbed on appeal." *S.C. State Hwy. Dep't v. Clarkson*, 267 S.C. 121, 126–27, 226 S.E.2d 696, 697 (1976).

Justice Toal's appellate treatise even flags this half-century-old change in the law:

> An order granting or refusing a new trial affects a substantial right and is immediately appealable. An earlier line of cases appeared to suggest that the appealability of a decision to grant a new trial was dependent on the type of error committed by the trial judge or the degree of evidence supporting the decision. The Supreme Court has since clarified, however, that cases making such distinctions did not address appealability, but rather, the proper scope of review.

Jean H. Toal *et al.*, *Appellate Practice in South Carolina* 163 (3d ed. 2016) (citing *Clarkson*, 267 S.C. at 126–27, 226 S.E.2d at 697). As such, *Donkle* provides no basis at all to dismiss this appeal.

Second, assuming *arguendo* the "law v. fact" distinction somehow remained relevant to the appealability analysis (it doesn't), it is unclear how this Court concluded (again, on its own initiative) that the IMI Fabi entities are basing their appellate arguments on something other than errors in the application of South Carolina law. No appellate briefs have yet been filed, and the arguments presented below make it obvious that the trial court was wrong on the law—perceived discovery deficiencies cannot serve as the basis for setting aside a jury's work and awarding a new trial ***as a matter of law***. The Supreme Court has reinforced this settled point of South Carolina law in, at least, *Raby Construction* and *Aaron*, but neither was even cited in the circuit court's order.[3]

[3] The circuit court also erred as a matter of law by finding that the IMI Fabi entities are subject to personal jurisdiction in South Carolina. All that has ever been argued to support such a finding is a nebulous "stream of commerce" theory, where the plaintiffs argue and the trial court agrees that if a commodity is placed in the "stream of commerce" anywhere in the world and it happens to wind up in South Carolina, whoever put it in the "stream" is now subject to personal jurisdiction in South Carolina. The United States Supreme Court has rejected such a boundless, happenstance view of personal jurisdiction. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). This error of law is also part of this appeal, which is why the IMI Fabi entities affixed portions of the trial transcript to their notice of appeal, as those oral rulings were the only decisions ever reached on the IMI Fabi entities' Rule 12(b)(2) motions.

Accordingly, while the IMI Fabi entities certainly reserve their ability to argue for reversal of the trial court's new-trial order on all grounds appearing in the record, there is no basis in the record from which this Court could have deduced (again, on a *sue sponte* basis) that their appeal was necessarily about "facts" when their arguments below have explained time and again how the "law" rejects the plaintiffs' request for a new trial and the circuit court's granting of that request. Rehearing is essential.

III. Orders granting new trials have uniformly been reviewed on appeal since 1976.

Not only is the dismissal order inconsistent with the appellate statute and based on case law that has been rejected for nearly fifty years, it is also contrary to cases reviewing on appeal orders granting a new trial since the Supreme Court clarified in *Clarkston* the "fact v. law" appealability misconception. Examples of these appeals abound in South Carolina jurisprudence and illustrate the incorrectness of the dismissal order. *See, e.g.*, *Westbury v. Bauer*, 284 S.C. 385, 326 S.E.2d 151 (1985) (reviewing on appeal an order granting a new trial); *Dent v. Redd*, 270 S.C. 585, 243 S.E.2d 460 (1978) (same); *S.C. State Hwy. Dep't v. Terrain, Inc.*, 267 S.C. 186, 227 S.E.2d 184 (1976) (same); *Country Props., LLC v. Martin*, Op. No. 2021-UP-292, 2021 S.C. App. Unpub. LEXIS 315 (Ct. App. Aug. 4, 2021) (same); *Livingston v. Carolina Timber Co.*, 282 S.C. 596, 320 S.E.2d 474 (Ct. App. 1984) (same). The dismissal order should be vacated accordingly.

SUGGESTION OF EN BANC REHEARING

The IMI Fabi entities are at a loss as to what prompted the Court's *sua sponte* dismissal order. It is contrary to the unambiguous language of the appellate statute and a half-century of appellate jurisprudence. What's more, it is based on an assumption that the IMI Fabi entities do not intend to challenge the trial court's new-trial ruling on the law—an assumption that is not

only incorrect, it is contrary to the lead arguments the IMI Fabi entities actually made at the trial level. The trial court's order on appeal is wrong as a matter of law, and the IMI Fabi entities are entitled as a matter of right to demonstrate those errors to this Court and beyond if necessary.

The *sua sponte* dismissal order sets a dangerous precedent of this Court dismissing appeals in contravention of controlling law, and based on nothing more than an incorrect assumption about what an appellant may put in its opening brief. Appeals are an essential check within the litigation process, and the IMI Fabi entities are entitled to have this Court review the orders below, correct the legal errors within them, and either dismiss the IMI Fabi entities from this dispute for lack of personal jurisdiction or reinstate the jury's verdict following a weeklong trial.

CONCLUSION

The IMI Fabi entities respectfully request that the Court rehear and vacate the order dismissing this appeal and allow the appeal to continue.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellants, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

Pleading(s): Petition for Rehearing of *Sua Sponte* Dismissal Order and Suggestion of Rehearing *En Banc*

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