

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No.: 2013-CP-23-05159

Capital Growth Corporation d/b/a CGC
Management Company and Fairhill, Ltd.
d/b/a Fairhill Ltd., L.P.,

Appellants,

v.

Cheyenne Burrell and Richard Burrell,

Respondents.

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Monday, October 27, 2014

William A. Jordan, Jr.
S.C. Bar #3226
William A. Jordan, III
S.C. Bar #101271
Jordan Law Center
622 Wade Hampton Boulevard
Greenville, S.C. 29609
(864) 235-0147
(864) 467-9349 (fax)
William@williamjordan.org

Attorneys for Respondent

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I. THE RESPONDENTS' MOTION TO DISMISS THE APPEAL SHOULD BE GRANTED BECAUSE AN APPEAL FROM THE DENIAL OF A MOTION TO DISMISS OR MOTION TO SET ASIDE THE ENTRY OF DEFAULT DOES NOT INVOLVE THE MERITS, AND IS THEREFORE AN INTERLOCUTORY APPEAL.

In response to Respondents' motion to dismiss the appeal, Appellants argue that this appeal should be allowed, pursuant to South Carolina Code Section 14-3-330 (1).

The statute provides as follows:

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, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from.

S.C. Code Ann. § 14-3-330 (2014).

In this case, the Appellants filed several motions: a motion to set aside the default, a motion for the enlargement of time to file an answer, and a motion to dismiss, based on Rules 12(b)(2) (lack of personal jurisdiction – due to improper service), 12(b)(4) (insufficiency of process), and 12(b)(5) (insufficiency of service of process). The trial court's order specifically denied each of these three motions. Each of these motions involved procedural issues in the case, which must be resolved by the trial judge – issues which never go to the jury. Moreover, there are substantial issues to be determined concerning the party's rights, including the Respondents' damages, before a final judgment has been rendered, and the case becomes appealable. There is substantial case law on what constitutes an order which "involves the merits."

An order "involves the merits," as that term is used in Section 14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense. *Peterkin v. Brigman*, 319 S.C. 367, 461 S.E.2d 809 (1995); *Mid-State Distributors*, 310 S.C. at 334, 426 S.E.2d at 780; *Knowles v. Standard Sav. & Loan Asso.*, 274 S.C. 58, 261 S.E.2d 49 (1979). The phrase "involving the merits" is narrowly construed in modern precedent. An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. *Mid-State Distributors*, 310 S.C. at 334-335, 426 S.E.2d at 780 (order denying motion to dismiss case based on lack of personal jurisdiction was not immediately appealable, as the litigant had "not arrived at the end of the road");

Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 7,630 S.E.2d 464, 467-468 (2006).

For all of these reasons, the Appellants' reliance upon § 14-3-330(1) is misplaced. This is not an appeal from an order involving the "merits" in the lower court. Nothing on the merits was decided. Rather, it is an appeal from an order denying a routine motion to dismiss, a *procedural* issue, not a ruling on the *merits*, for improper service.

Appellants made a procedural motion. They can style it any way they wish: a motion to dismiss for lack of personal jurisdiction; a motion to dismiss based on the statute of limitations; or, a motion to dismiss for improper service. The motion was denied. The lower court's ruling did not dispose of the case. It did not finally determine the "merits" of a defense. It is not a ruling that "finally determines" anything within the meaning of our case law. Judge Lee's Order is not one that can be "enforced" in any way against the Appellants.

The lower court's ruling is not a final judgment under any South Carolina Supreme Court or Court of Appeals decision. There is no authority at all, in any way

whatsoever, that the Appellants have cited, nor can they cite, which stands for the simple, straightforward, proposition of law that an order denying a motion to dismiss for lack of improper service is immediately appealable. Imagine the result which would ensue if this Court were to hold that an order denying a motion to dismiss for lack of improper service is immediately appealable: this Court would be inundated with appeals on this issue, because motions to dismiss for various issues are made in virtually every case.

Moreover, following the Appellant's reasoning, what would then be the difference between this motion and a motion to dismiss for lack of subject matter jurisdiction or improper venue, or lack of personal jurisdiction, or any of the other run-of-the-mill 12 (b) motion that is routinely made by every single Defendant that gets sued in this State? At first blush, the Appellants seem to have proffered a decent argument for the appealability of Judge Lee's decision denying a motion to dismiss pursuant to Rules 12 (b) (2), (4), and (5) for lack of proper service.

In the face of such an enormous amount of precedence that is contrary to their position, Appellants' argument goes like this: The Supreme Court allowed an appeal in *Richardson*. In *Richardson*, a motion to set aside the entry of default had just been denied; no final judgment had been entered in the case. The lower court ruled that the Appellant's desk clerk had actual and apparent authority to accept service. Thereafter, *Richardson* sat in the Court of Appeals until the Supreme Court took jurisdiction to hear it. The Supreme Court then ruled that the lower court was correct and the desk clerk did have apparent and express authority to accept service. Procedurally, they say, this

case is just like *Richardson*. So far, so good for the Appellants in this case. But the argument falls apart after a simple look at the law governing the appealability of orders before a final judgment. This is because our Court has expressly said that its *silence* does not mean *agreement* on the issue.

Upon closer review of the case law which has developed both before and after the decision in *Richardson*, this Court must reach the conclusion that this case does not fall within the exception listed in Section 14-3-330(1). In *Richardson*, the Respondent never filed a motion to dismiss the appeal; the Supreme Court did not raise it on its own. South Carolina case law on the appealability of an order states that even the Supreme Court's silence on this issue means nothing. The Appellant's argument *is qui tacet consentire videtur*. "He who is silent is taken to agree." But silence is never agreement, says the Supreme Court, and litigants should not take silence to mean agreement.

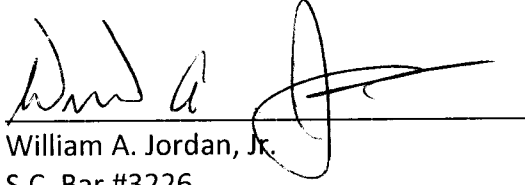
The precise argument that the Appellants are making was expressly rejected in *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995). In *Woodard*, Plaintiff brought an action for injuries he received when a hose disengaged and sprayed him with a chemical that burned him severely. The Defendant moved to dismiss the case on the basis that the Plaintiff was a statutory employee of the Defendant. The lower court denied the motion to dismiss, which was made pursuant to Rule 12 (b)(1), SCRPC. The Defendant appealed. The Court of Appeals concluded that that an order denying a Rule 12 (b) motion to dismiss was immediately appealable. The Court of Appeals relied on two previous Supreme Court decisions where an appeal was allowed. The Court of

Appeals reasoned that silence about the issue of appealability from the Respondent meant that the appeal was proper, even if it had not been directly raised in those two cases. The Defendant argued, as the Appellants do here, that because the Court allowed an appeal in two prior similar cases, it should also be allowed in that case.

The Supreme Court disagreed, noting “the appealability of such orders was not an issue raised in those cases. Consequently, *Timms* and *Duncan* are not controlling on the question whether the denial of a motion to dismiss for lack of subject matter jurisdiction is immediately appealable.” See *Wallace v. Interamerican Trust Co.*, 246 S.C. 563, 144 S.E.2d 813 (1965) (the fact that an appellate court may have decided an appeal of a particular type of order on the merits is not dispositive of whether the order is appealable when the issue of appealability was not raised); see also *State v. Lockhart*, 275 S.C. 160, 267 S.E.2d 720 (1980).” *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995). What is more, our court has expressly ruled that the denial of a Rule 12 motion to dismiss is not immediately appealable every single time it has ruled on the issue. Accord: *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526, 443 S.E.2d 539, 540 (1994) “The motion to dismiss has the effect of asserting that respondent has failed to state a cause of action. The denial of such a motion is not immediately appealable under S. C. Code Ann. § 14-3-330 (1976 & Supp. 1993).” *Moyd v. Johnson*, 289 S.C. 482, 347 S.E. 2d 97 (1986).

For the foregoing reasons, and the reasons stated in Respondents’ initial brief in support of its Motion to Dismiss, Respondents respectfully move to have this appeal dismissed and for an award of costs and attorney’s fees.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'William A. Jordan, Jr.', written over a horizontal line.

William A. Jordan, Jr.

S.C. Bar #3226

William A. Jordan, III

S.C. Bar #101271

Jordan Law Center

622 Wade Hampton Boulevard

Greenville, S.C. 29609

(864) 235-0147

(864) 467-9349 (fax)

William@williamjordan.org

Attorneys for Respondents

Greenville, South Carolina

Dated: October 27, 2014

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CERTIFICATE OF SERVICE

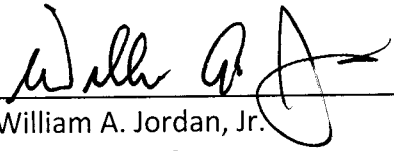
I, the undersigned Attorney of the Jordan Law Center, attorneys for the Appellant, do hereby certify that I have served the Appellants' Counsel with a copy of the enclosed **Respondents' Reply in Support of Motion to Dismiss**, mailing a copy of the same by United States Mail, postage prepaid, to the following address: Curtis W. Dowling, Esquire, Barnes, Alford, Stork & Johnson, LLP, Post Office Box 8448, Columbia, South Carolina, 29202.

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(864) 235-0147

(864) 467-9349 (fax)

William@williamjordan.org

Attorneys for Respondents



Jordan Law Center

Attorney William Jordan
Attorney William A. Jordan, III

October 27, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Capital Growth Corporation d/b/a CGC Management Company and Fairhill, LTd. d/b/a Fairhill Ltd., L.P. v. Cheyenne Burrell and Richard Burrell, Case No: 2013-CP-23-05159

Dear Ms. Kitchings:

Enclosed for filing please find the original and six (6) copies of the Respondents' Reply in Support of Motion to Dismiss, along with a Certificate of service for same. Please file the originals and return a clocked copy to us in the enclosed, self-addressed stamped envelope.

Thank you for your assistance in this matter.

Sincerely,

William A. Jordan, Jr.

/tdh

Enclosures

cc: Curtis W. Dowling, Esquire

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