

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEE COUNTY

W. Jeffery Young, Presiding Judge, Third Judicial Circuit

Case No. 2013-CP-31-00130

Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of Mary Denman Newman, deceased, Ronald O. Palmer, Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of James E. Newman, deceased, Respondents,

v.

Hatcham Grove, Inc., and David H. Lucas, Appellants.

RESPONDENTS' MEMORANDUM OF LAW REGARDING
APPEALABILITY OF APPEALED ORDER

Respondents, Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of Mary Denman Newman, deceased, Ronald O. Palmer, and Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of James E. Newman, deceased, submit this Memorandum Regarding Appealability of Appealed Order as requested by the Court in its letter dated December 1, 2014. For the reasons set forth herein, the appealed order is interlocutory and not immediately appealable.

ARGUMENT

The appealed order of the Honorable W. Jeffery Young dated September 22, 2014 and filed with the Lee County Clerk of Court on October 15, 2014 disposes of several motions which were heard by the lower court on September 12, 2014. Appellants moved for summary judgment based upon deemed admissions pursuant to Rule 36, S.C.R.C.P. In response, Respondents moved for an order either extending the time in which Respondents'

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responses to Appellants' requests for admission could be served or allowing Respondents to withdraw or amend their responses to Appellants' requests to conform to those responses served on Appellants' on July 25, 2014 (requests received by Respondents on June 20, 2014). Judge Young's order denied the Appellant's motion for summary judgment, granted Respondents' motion extending the time in which Respondents had to serve their responses to Appellants' requests for admission and replace any deemed admissions with those responses served on Appellants on July 25, 2014, and granted Respondents' motion for partial summary judgment.

Generally, only final judgments are appealable. Ex parte Wilson, 367 S.C. 7, 625 S.E.2d 205 (2005). The appealability of any order in these circumstances is governed by S.C. Code Ann. § 14-3-330, the pertinent portion of which is:

"The Supreme Court shall have appellant jurisdiction for correction of errors of law in cases, and shall review on appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas...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;

2) an order affecting a substantial right made in an action where such order (a) in affect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, ...or (c) strikes out an answer or any part thereof or any pleading in any action..."

Here, Judge Young's order in no way determines the action, prevents a later appeal, discontinues the action or strikes a pleading. The order is simply an exercise of the lower court's discretion provided to it by the South Carolina Rules of Civil Procedure. The grant or denial of a motion under Rules 6 or 36(b) is within the discretion of the trial court. See Rule 36(b), S.C.R.C.P. ("...the court *may* permit withdrawal or amendment..."); Rule 6, S.C.R.C.P. ("...the court...*may...in its discretion...*") An order involving merely the exercise of discretion is not immediately appealable. Blakely & Copeland v. Frazier, 11 S.C. 122 (1876); Deal v. Deal, 85 S.C. 262, 675 S.E.2d 241 (1909). Despite, Judge Young's order, the Appellants may still have their day in court and may assign error in an appeal following final judgment.

The same is true with respect to the lower court's denial of Appellants' motion for

summary judgment. South Carolina courts have held time and again that the denial of a summary judgment is not immediately appealable. e.g., Willis v. Bishop, 276 S.C. 156, 276 S.E.2d 310 (1981). Furthermore, it has been held that the denial of summary judgment is not reviewable even on appeal from a final judgment. Raino v. Goodyear Tire, 309 S.C. 255, 422 S.E.2d 98 (1992). This is because a denial for summary judgment decides nothing about the merits of the case, but simply provides that the case should proceed to trial. Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994). In other words, the denial of summary judgment does not finally determine anything and does not have the effect of striking a defense or pleading since that same defense may be raised later in the proceedings. Id.

The portion of the lower court's order granting Respondents' motion for partial summary judgment with regard to Appellants' cause of action alleging a violation of South Carolina's Attorney Preference Statute (S.C. Code Ann. § 37-10-101) should not be immediately appealable given that any error of law which Appellants' might assign to Judge Young in this regard may be corrected on appeal by virtue of S.C. Code Ann. § 14-3-330 (1). An order granting a motion for partial summary judgment may be reviewed after the entry of a final judgment. Tommy L. Griffin Plumbing & Heating, Inc. v. Jordan, Jones, & Goulding, Inc., 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002); Link v. School District of Pickens Co., 302 S.C. 1, 393 S.E.2d 176 (1990). As a result, this Court should dismiss the appeal or otherwise limit the scope of its review as appropriate.

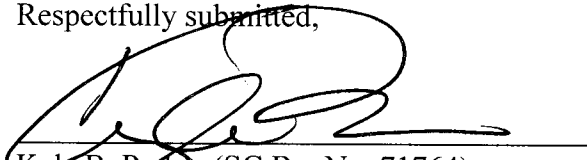
Judge Young's order does not determine or discontinue the action and any appeal of the order may be had following the trial. See Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000). Respondents urge the Court to dismiss the appeal so as to "advance the salutary consideration of avoiding 'piecemeal litigation' which would occur if immediate review of such pretrial motions were either mandated or permitted". Id.

CONCLUSION

For the reasons set forth above, the Court should dismiss the appeal or limit its review of the lower court's order.

(Signature appears on following page)

Respectfully submitted,



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December 11, 2014

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Attorneys for Appellants

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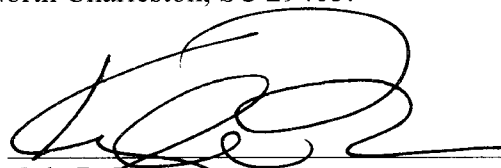
Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of Mary Denman Newman, deceased, Ronald O. Palmer, Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of James E. Newman, deceased, Respondents,

v.

Hatcham Grove, Inc., and David H. Lucas, Appellants.

PROOF OF SERVICE

I certify that I have served the Respondents' Memorandum Of Law Regarding Appealability Of Appealed Order, by mailing a copy of same via regular United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below, addressed to Appellants' attorney of record, Magalie A. Arcure, Esq., 4000 Faber Place Drive, Suite 450, North Charleston, SC 29405.



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December 11, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of Mary Denman Newman, deceased, Ronald O. Palmer, Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of James E. Newman, deceased, Respondents, v. Hatcham Grove, Inc., and David H. Lucas, Appellants
Appellate Case No. 2014-002451

Dear Ms. Kitchings:

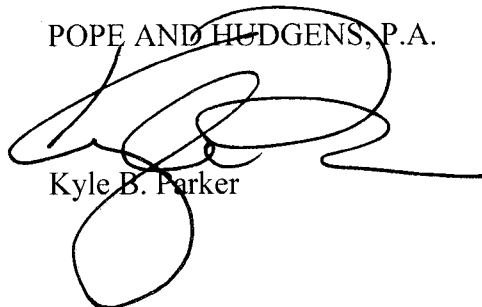
Enclosed please find for filing the original and six copies of Respondents' Memorandum Of Law Regarding Appealability Of Appealed Order, along with Proof of Service for the same, in regards to the above referenced matter.

Should any questions or concerns, please feel free to give me a call.

With my kindest regards, I am,

Sincerely,

POPE AND HUDGENS, P.A.



Kyle B. Parker

KBP/tem
Enclosures
cc: Magalie A. Arcure, Esq.