

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

Common Pleas Case Nos. 2007-CP-38-196 & 2007-CP-38-201
Appellate Case No. 2014-001634

First Citizens Bank and Trust Company,.....Appellant/Respondent,

v.

Clyde B. Livingston; Technico Marketing & Distribution, Inc.; B. Livingston and
Charlotte V. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.;
Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller
Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of whom Clyde B. Livingston is the.....Respondent/Appellant.

And

First Citizens Bank and Trust Company,.....Appellant/Respondent,

v.

Clyde B. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.;
Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller
Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of whom Clyde B. Livingston is the.....Respondent/Appellant.

REPLY TO APPELLANT/RESPONDENT’S RETURN TO MOTION FOR
PARTIAL DISMISSAL OF APPELLANT/RESPONDENT’S APPEAL

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Respondent/Appellant

RECEIVED

MAR 02 2015

SC Court of Appeals

Respondent/Appellant hereby submits this reply to Appellant/Respondent's return to Respondent/Appellant's motion for an order that dismisses Appellant/Respondent's appeal to the extent that it is an appeal of the denial of summary judgment, which is not appealable.

The exception Appellant/Respondent trumpets was abrogated by the Supreme Court. Appellant/Respondent writes in its return that Respondent/Appellant's "casting of review of a denial [of] summary judgment as 'never' being possible is inaccurate and fails to address the Supreme Court permitting review in instances like this appeal, where the Court may take review of related and other issues contained in the same order." (Return to motion to partially dismiss appeal p. 3.) Appellant/Respondent alludes to a passage from Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003), that mentions Davis v. Luncelford, 287 S.C. 242, 243, 335 S.E.2d 798, 799 (1985). What Appellant/Respondent does not mention, though, is that the passage from Olson presented the Davis decision as an outlier, a deviation from precedent – precedent to which the Court returned in Olson. Olson, 354 S.C. at 167-68. The relevant passage from Olson is below:

The only recent exception to this rule by this Court was in a case prior to Ballenger, Davis v. Luncelford, 287 S.C. 242, 335 S.E.2d 798 (1985), in which we allowed the appeal of the denial of summary judgment to proceed in the third appeal of a medical malpractice action which had been pending for thirteen years.

We adhere to recent precedent and hold that the denial of a motion for summary judgment is not appealable, even after final judgment. To the extent the cases cited by the Court of Appeals are inconsistent, they are expressly overruled. Accordingly, the Court of

Appeals' refusal to consider the merits of Faculty House's appeal is affirmed.

Id.

As noted in Respondent/Appellant's motion, the cases cited in Olson as being expressly overruled, 354 S.C. at 168 & n. 8, were cases in which appellate review of an order denying summary judgment was undertaken on the grounds that another, appealable issue was before the court – the very same thing that Appellant/Respondent now asks this court to do. Tanner v. Florence City-Cnty. Bldg. Comm'n., 333 S.C. 549, 553, 511 S.E.2d 369 (Ct. App. 1998); Anthony v. Padmar, Inc., 307 S.C. 503, 513, 415 S.E.2d 828, 835 (Ct. App. 1991); Garrett v. Snedigar, 293 S.C. 176, 183 n. 2, 359 S.E.2d 283, 287 n. 2 (Ct. App. 1987). The other-appealable-issue exception for review of denials of summary judgment did not survive Olson. 354 S.C. at 167-68. That is the only reading of Olson that is consistent with its text and the cases that have come after it. (See cases cited in Respondent/Appellant's motion.)

Further, the other-appealable-issue exception does not appear to be what was involved in the Davis case, although that does not save Appellant/Respondent's argument. 287 S.C. at 242. Davis, rather, involved a one-time deviation from the precedent established in Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994), that the denial of summary judgment is not appealable. Davis, 287 S.C. at 242. This was a deviation corrected by the Court in Olson. 354 S.C. at 167-68. Indeed, Olson ends with a statement by the Court that “[w]e adhere to Ballenger” – as opposed to adhering to Davis – “and hold the denial of summary judgment is not appealable, even after final judgment.” Id. at 168.

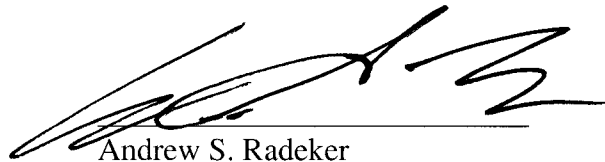
Since Olson, this court has held time and again that the denial of summary judgment is not appealable, period. (See cases cited in Respondent/Appellant's motion.) This court is correct to state that an order denying summary judgment "is not appealable under any circumstance." Thornton v. SCE&G, 391 S.C. 297, 301, 705 S.E.2d 475, 477 (Ct. App. 2011). Respondent/Appellant should not have to brief any issue related to the denial of summary judgment.

The denial of summary judgment is not intertwined with the denial of Appellant/Respondent's motion to strike the jury demand. There is no intertwinement between the denial of summary judgment Appellant/Respondent seeks to appeal and the denial of the motion to strike the jury demand. A review of his order readily notes that Judge Jackson did not base his decision not to strike the jury demand on the outcome of the motion for summary judgment. (Order of the Hon. James B. Jackson, Jr., filed April 17, 2014.) He referenced an order by Judge Goodstein from 2010 in denying summary judgment as to the libel claim; his law-of-the-case reasoning in denying the motion to strike the jury demand was based different orders by Judge Burgdorf from 2007 and 2008 on a different matter. (Order of the Hon. James B. Jackson, Jr., filed April 17, 2014, pp. 10-11, 12-13.) The portion of the order setting out the ruling on the motion to strike the jury demand does not speak to the factual record in the case, and the portion of the order denying summary judgment does not speak to the issues of the motion to strike the jury demand. There is no overlap, much less intertwinement, of these rulings. They are set forth in the same order document because the motions that brought them before Judge Jackson were argued on the same day.

The rest of the return hardly needs a reply. The remainder of the return is mostly just more *ad hominem* attacks that barely warrant a response at all. See Huntington Beach City Council v. Superior Ct., 115 Cal. Rptr. 2d 439, 448, 94 Cal. App. 4th 1417, 1430 (Cal. App. 2002) (definition and discussion of *ad hominem* argument). Suffice it to say that Appellant/Respondent's contentions that it knows what Respondent/Appellant will argue later are presumptuous, to say the least.

WHEREFORE Respondent/Appellant asks that this court grant his motion for an order dismissing Appellant/Respondent's appeal to the extent that it is an appeal of the denial of summary judgment.

Respectfully submitted,



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Respondent/Appellant

March 2, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

Common Pleas Case Nos. 2007-CP-38-196 & 2007-CP-38-201
Appellate Case No. 2014-001634

First Citizens Bank and Trust Company,.....Appellant/Respondent,

v.

Clyde B. Livingston; Technico Marketing & Distribution, Inc.; B. Livingston and Charlotte V. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of whom Clyde B. Livingston is the.....Respondent/Appellant.

And

First Citizens Bank and Trust Company,.....Appellant/Respondent,

v.

Clyde B. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of whom Clyde B. Livingston is the.....Respondent/Appellant.

PROOF OF SERVICE

RECEIVED

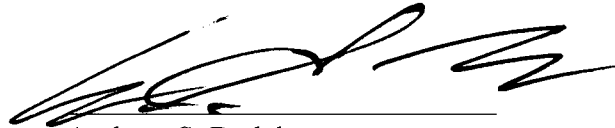
MAR 02 2015

SC Court of Appeals

I certify that I served the foregoing reply to return to motion to dismiss by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

A. Mattison Bogan, Esq.
Erik T. Norton, Esq.
Tara C. Sullivan, Esq.
Nelson Mullins Riley & Scarborough LLP
P.O. Box 11070
Columbia, SC 29201

March 2, 2015

A handwritten signature in black ink, appearing to read 'Andrew S. Radeker', written over a horizontal line.

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Respondent/Appellant

LAW OFFICES
HARRISON & RADEKER, P.A.
923 CALHOUN STREET
COLUMBIA, SOUTH CAROLINA 29201

James C. Harrison, Jr.*
Andrew S. Radeker
Taylor M. Smith IV

* Mediator/Arbitrator

P.O. Box 50143
Columbia, SC 29250

(803) 779-2211
(803) 779-6700 (FAX)

March 2, 2015

VIA HAND DELIVERY

The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

Re: First Citizens Bank, etc. v. Clyde B. Livingston, et al.
Appellate Case No. 2014-001634

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and seven copies of a reply to the return to the motion for partial dismissal of the appellant/respondent's appeal, with attached proof of service thereof.

Kindly file these documents and return a file-stamped copy to this office in the stamped and addressed envelope enclosed. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
HARRISON & RADEKER, P.A.



Andrew S. Radeker

ASR/

Enclosures

cc: A. Mattison Bogan, Esq.
Erik T. Norton, Esq.
Tara C. Sullivan, Esq.

RECEIVED

MAR 02 2015

SC Court of Appeals