

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

MAR 10 2015

SC Court of Appeals

75310

Appellate Case No. 2015-000294
Case No. 2014-CP-10-5462

W. Mullins McLeod, Jr.,Respondent,

v.

Pierce Hems Sloan and Wilson, LLC
f/k/a Pierce Hems Sloan & McLeod, LLC,.....Appellants,

v.

McLeod Law Group, LLC,.....Third-Party Defendant.

**RESPONDENT'S AND THIRD-PARTY DEFENDANT'S
MOTION TO DISMISS AND LEVY SANCTIONS**

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ATTORNEY FOR RESPONDENT AND
THIRD-PARTY DEFENDANT

Columbia, South Carolina
March 10, 2015

FACTUAL AND PROCEDURAL BACKGROUND

Respondent W. Mullins McLeod, Jr. filed this action on September 8, 2014, in the Charleston County Court of Common Pleas for breach of contract and negligent misrepresentation arising from a dispute concerning the Operating Agreement of Appellant Pierce Hems Sloan and Wilson, LLC, and the rights of Appellant's members. Specifically, Respondent seeks an accounting and full payment of his membership interest consistent with the terms of the Operating Agreement and agreement of the members therein.

On October 31, 2014, Appellant answered, generally denying the allegations and joined counterclaims against Respondent's current law firm, Third-Party Defendant McLeod Law Group, LLC. Appellant also moved to dismiss for lack of subject matter jurisdiction or, in the alternative, to stay the Circuit Court action pending an appraisal. Appellant also sought dismissal based on lapse of the statute of limitations.

On January 16, 2015, the Honorable R. Markley Dennis, Jr., Circuit Court Judge, held a hearing on the motions.¹ At the conclusion of that hearing, Judge Dennis denied Appellant's motion to dismiss. Judge Dennis also declined to stay this action. On January 20, 2015, the Circuit Court entered a Form 4 Order denying the motion. See Order (attached as **Exhibit A**). This form Order provides, in relevant part, that "Defendant's Motion to Dismiss or Stay, filed on 10/31/14, is DENIED" and that "This order [...] does *not* end the case." Id. (emphasis added).

¹ Appellant also moved to quash a subpoena served by Respondent but the subpoena was voluntarily withdrawn during the hearing.

On February 11, 2015, Appellant filed a notice of appeal with this Court purporting to “hereby appeal[] the Order of the Honorable R. Markley Dennis, Jr., denying Appellant’s Motion to Dismiss or, in the alternative, to Stay, dated January 20, 2015.” See App.’s Not. Appeal (parenthetical omitted) (attached as **Exhibit B**). This motion followed.

ARGUMENT

South Carolina common law, statutory law, and the rules of court (with limited exception not applicable here) only permit the appeal of *final* judgments. The Circuit Court’s Order is unmistakably not a final judgment, nor of the character for which interlocutory review has been authorized. This appeal lacks any indicia of good faith compliance with the rules, serves no purpose beyond delay, and is burdensome to Respondent and the Court. It should be dismissed as frivolous and Appellant should be sanctioned pursuant to Rule 269 of the South Carolina Appellate Court Rules.

“South Carolina adheres to the final judgment rule.” Brunson v. Am. Koyo Bearings, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005). This means that, with some exception, “an appeal lies only from a final judgment.” Id.; see also Hagood v. Sommerville, 362 S.C. 191, 194-95, 607 S.E.2d 707, 708 (2005); Watson v. Underwood, 407 S.C. 443, 457, 756 S.E.2d 155, 163 (Ct. App. 2014). A “final judgment” is a judgment that ends the case and leaves nothing to be decided. “If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory[,]” not final. Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). For example, “If a judgment determines the applicable law while leaving open questions of fact, it is not a final

judgment.” Id. Of course, this is precisely what the Circuit Court’s decision has done here: it declined to dismiss this case for failure to state a claim, thus allowing the parties to develop the factual record in furtherance of a future decision by the court or the jury on the merits.

The final judgment rule’s fundamental limitation on appellate practice before this state’s courts is neither a novel proposition, see, e.g., Adickes v. Allison, 21 S.C. 245, 258-59 (1884), nor an opaque one as the rule is memorialized by the common law, statute, and the rules. For example, S.C. Code § 14-3-330 confers appellate jurisdiction over an “intermediate judgment, order or decree in a law case *involving the merits* ... and final judgments in such actions[.]” S.C. Code Ann. § 14-3-330(1) (emphasis added).² “The phrase ‘involving the merits’ is narrowly construed” and orders are deemed interlocutory and not appealable “when there is some further act that must be done by the trial court prior to a determination of the parties’ rights.” Watson, 407 S.C. at 458, 756 S.E.2d at 163 (quoting Ex parte Capital U–Drive–It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 467-68 (2006)). The rules of court also clearly establish this limitation. For example, the South Carolina Rules of Civil Procedure provide “[a]ppel may be taken, as provided by law, from any final judgment or appealable order.” SCRCF 72. Similarly, the appellate rules explain “[a]ppel may be taken, as provided by law, from any final judgment, appealable order or decision.” SCACR 201(a) (emphasis added).

Interlocutory appeals are only permitted when the order reaches the merits or affects “a substantial right.” Brunson, 367 S.C. at 165, 623 S.E.2d at 872 (quoting S.C.

² See also S.C. Code Ann. § 14-8-200 (establishing this Court’s appellate jurisdiction with “the same scope of review that the Supreme Court would apply in a similar case.”).

Code Ann. § 14–3–330(1)-(2)). An order affects a substantial right when it “(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action[.]” S.C. Code Ann. § 14–3–330(2). For example, an order depriving a party of a mode of trial constitutes the denial of a substantial right.³ This case does not and South Carolina law has long declined to grant interlocutory review to the denial of a Rule 12(b)(6) motion.

Nearly 20 years ago in Mid-State Distributors, Inc. v. Century Importers, Inc., the Supreme Court dismissed an appeal of seeking review of the denial of a pre-trial motion under Rule 12(b)(6) as interlocutory. In Mid-State Distributors, a distributor sued a brewery for wrongful termination and the brewery sought dismissal for lack of personal jurisdiction. Mid-State Distributors, 310 S.C. at 331, 426 S.E.2d at 778. The circuit court denied the motion and the brewery took appeal. Id. The Supreme Court dismissed the appeal as interlocutory and explained that the denial of a Rule 12(b) motion is not appealable because there were genuine issues of fact that needed to be litigated by the trial court. See id. at 333, 426 S.E.2d at 779. Moreover, the Court explained that the brewery’s theory of appellate jurisdiction could not be squared with the adoption of the South Carolina Rules of Civil Procedure and the abolition of the demurrer. See id. at 333-34, 426 S.E.2d at 779-80.

Today we have defined an order which “involves the merits,” as an order which “must finally determine some substantial matter forming the whole or a part of some cause of action or defense....” Jefferson v. Gene’s Used

³ See, e.g., Ferguson v Harrison, 34 SC 169, 13 SE 332 (1890); McLaurin v Hodges, 43 SC 187, 20 SE 991 (1894); Alston v Limehouse, 61 SC 1, 39 SE 192 (1900).

Cars, Inc., 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988); Knowles v. Standard Savings & Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979)

When [the cases relied on by the brewery] were decided, the State of South Carolina had a very broad definition of what “involved the merits.” During the same time frame, South Carolina law also made demurrers immediately appealable. We have now defined “involving the merits” in a more narrow fashion and eliminated the practice of immediately appealing the demurrer. An appeal based on the facts presented in [those cases] could not be maintained under our current definition of “involving the merits,” or under the current rules of civil procedure.

Id. at 334, 426 S.E.2d at 780. Mid-State Distributors and its progeny has been the law of this jurisdiction for almost two decades and definitively closes the door to appellate review of this matter.

This appeal should be dismissed as frivolous and Appellant should be sanctioned for wasting Respondent’s resources and those of the Court. The South Carolina Appellate Court Rules provides that:

Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

Rule 269, SCACR. This appeal meets this standard because it fails to comport with any discernable rule of appellate practice and lacks any indicia of a meritorious appeal. Cf. Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 629-30, 645, 760 S.E.2d 399, 404, 412 (2014) (upholding Rule 11 sanctions against party that engaged in “dilatory litigation tactics,” and lodged a “frivolous and dilatory” interlocutory appeal), reh’g denied (Aug. 5, 2014). Tellingly, Appellant’s preferred outcome below was dismissal *or a stay*—a judicially sanctioned delay of this action. The Circuit Court rejected that

argument whereupon Appellant filed this appeal in an effort to obtain the delay Judge Dennis correctly ruled was unwarranted. This sort of conduct is precisely the sort of harassment and delay Rule 269 contemplates.

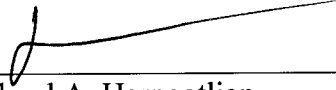
Finally, sanctions are particularly appropriate here as Appellant, a law firm, is a highly sophisticated litigant that is bound by the same ethical constraints as its counsel. See generally, Rule 8.4, RPC, Rule 407, SCACR (deeming it misconduct to violate the rules or “knowingly assist or induce another to do so, or do so through the acts of another”). These constraints include an obligation “not [to] bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” Rule 3.1, RPC, Rule 407, SCACR. This appeal is in derogation of this standard and should be punished accordingly.

CONCLUSION

For the reasons set forth above, this motion should be granted and the Court should (1) dismiss this appeal, (2) admonish Appellant for wasting judicial resources, (3) order Appellant to pay the cost of this appeal to Respondent, and (4) order any further relief the Court deems just and proper to deter similar future conduct.

[signature page follows]

Respectfully submitted,



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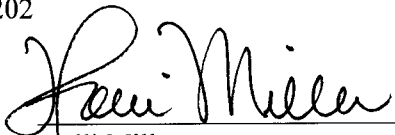
McLeod Law Group, LLC,.....Third-Party Defendant.

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for the Respondent and Third-Party Defendant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on March 10, 2015, served by having the same placed in the U.S. Mail, first class postage affixed, the following document to the below mentioned person:

Document: Respondent's and Third-Party Defendant's Motion to Dismiss and Levy Sanctions

Served: Ronnie Richter
Bland & Richter, LLP
Post Office Box 72
Columbia South Carolina 29202


Holli Miller

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FEB 16 2015

Richard A. McLeod, P.A.
Calendared

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In the Court of Appeals**

APPEAL FROM CHARLESTON COUNTY
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R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2014-CP-10-5462

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& McLeod, LLC Appellant,

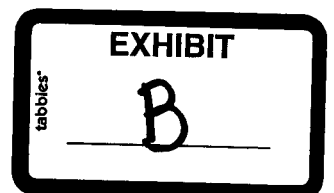
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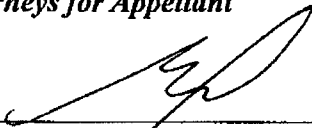
NOTICE OF APPEAL

Pursuant to Rule 203(c) of the South Carolina Appellate Court Rules, Appellant Pierce, Hems, Sloan and Wilson, LLC, hereby appeals the Order of The Honorable R. Markley Dennis, Jr., denying Appellant's Motion to Dismiss or, in the alternative, to Stay (Exhibit A), dated January 20, 2015. Appellant received written notice of entry of the Order on February 2, 2015.

February 11, 2015



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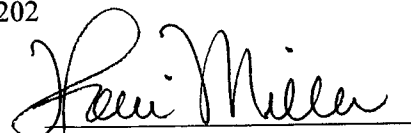
McLeod Law Group, LLC, Third-Party Defendant.

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Served: Ronnie Richter
Bland & Richter, LLP
Post Office Box 72
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Holli Miller

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

In Re: W. Mullins McLeod, Jr. v. Pierce HERNs Sloan and Wilson, LLC f/k/a
Pierce HERNs Sloan & McLeod, LLC v. McLeod Law Group, LLC
Appellate Case No. 2015-000294

Dear Ms. Kitchings:

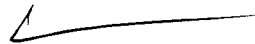
Enclosed please find for filing the original and eight (8) copies of Respondent's and Third-Party Defendant's Motion to Dismiss and Levy Sanctions in the above-referenced appeal. If you would be so kind as to clock-in the original and copies and return the extra copies to my courier, I would be most appreciative.

By copy of this letter, I am providing counsel of record with a copy of the same.

Thank you for your assistance in this matter.

With warm personal regards, I am

Sincerely,



Richard A. Harpootlian

/hm

Enclosures

cc: Ronnie Richter, Esq.