

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Appellate Case No. 2015-000563

RECEIVED
MAY 12 2015
SC Court of Appeals

David Bethea, Appellant,

v.

Stefon Davis, Respondent.

MEMORANDUM OF APPEALABILITY

Frank C. Swaggard
Wukela Law Firm
Post Office Box 13057
Florence, South Carolina 29504
(843) 669-5634

STATEMENT OF ISSUES

1. Is an Order Relieving Counsel immediately appealable?

STATEMENT OF THE CASE

Appellant was injured in a motor vehicle accident in Florence County on or about January 14, 2011. Appellant brought suit in Florence County through his attorney, Frank C. Swaggard, Esq., on October 16, 2013 for injuries he sustained as a result of the January 14, 2011 accident.

On October 28, 2014, Appellant's attorney filed a Motion to be Relieved. A hearing was held on the motion on February 2, 2015 before the Honorable D. Craig Brown. Judge Brown granted the motion and issued an Order Relieving Frank C. Swaggard, Esq. as counsel for the Appellant on February 23, 2015.

On or about March 10, 2015, Appellant wrote a letter to the Court which was construed as a Notice of Appeal of Judge Brown's Order Relieving Counsel.

ARGUMENT

- 1. An Order Relieving Counsel is not immediately appealable.**

"The right of appeal arises from and is controlled by statutory law." Hagood v. Sommerville, 362 S.C. 191, 195 (2005). "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330." Id.

"Section 14-3-330 provides this Court with appellate jurisdiction over:

- (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;

- (2) An order affecting a substantial right made in an action when such order (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;
- (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
- (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

Accordingly, an order must fall within one of the enumerated subsections to be immediately appealable.”

Energys Del., Inc. v. Hopkins, 401 S.C. 615, 617 (2013).

Since the order below “does not affect the merits of the action [...] subsection (1) would not apply.” Energys at 619. Furthermore, “the order was not made in a special proceeding and does not relate to an injunction or appointment of a receiver, and therefore, subsections (3) and (4) are likewise inapplicable.” Id. As such, the only question before the Court is whether or not an Order to Relieve Counsel is immediately appealable under subsection (2) of Section 14-3-330. Specifically, the Court must look to subsection (2)(a) and determine if the Order affects a substantial right that in effect determines the action and prevents a judgment from which an appeal might be taken. See Hagood.

In Enersys, the Supreme Court held, “an order denying a motion to disqualify an attorney is not immediately appealable,” because “policy considerations... such as the right of having an attorney of one’s choosing, [and] the importance of the attorney-client privilege... are not implicated.” Id. at 619. This distinguishes Enersys from Hagood in which the Supreme Court held that an order granting a motion to disqualify an attorney was immediately appealable based on policy concerns including,

“(1) the importance of the party’s right to counsel of his choice in an adversarial system; (2) the importance of the attorney-client relationship; (3) the unfairness in requiring a party to pay another attorney to become familiar with a case and repeat preparatory actions already completed by the preferred attorney; and (4) an appeal after final judgment would not adequately protect a party’s interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney.”
Hagood at 197.

Enersys was the second case to distinguish Hagood, after State v. Wilson, 387 S.C. 597 (2010). Wilson dealt with a motion to disqualify an assistant solicitor from a criminal case. The Wilson Court held that “the policy implications present in Hagood, i.e., the right of a party to retain counsel of his or her choosing and the development of an attorney/client relationship, are not compelling factors when considering the disqualification of an assistant solicitor. The reasons the Court articulated in Hagood as justification for allowing the direct appeal are not present here, as the State has no substantial right that has been invaded.” Wilson at 602-603.

Specific to the present case, an Order Relieving Counsel is not immediately appealable. This appears to be a novel issue, but the Court should follow Wilson and Enersys, and distinguish court orders which relieve attorneys from Hagood. As in

Wilson and Enersys, the present case does not implicate the Court's appellate jurisdiction under subsection (2)(a) because, "representation by a *particular* attorney does not in effect determine or discontinue the action, or prevent a judgment from which an appeal might be taken." Hagood at 200, (Pleicones, J., dissenting) (emphasis added). And, as in Wilson, the policy concerns which vested jurisdiction under subsection (2) in Hagood are "not compelling factors when considering" relieving an attorney from his obligations to a client. Specifically, Appellant "has no substantial right that has been invaded" as he is perfectly capable of hiring new counsel, or in representing himself at trial *pro se*. Wilson at 603.

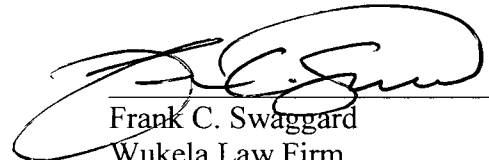
Appellant's rights to "have an attorney of his own choosing and the development of an attorney/client relationship" were not extinguished by the Order Relieving Counsel. In fact, Appellant wrote a letter to Judge Brown on or about March 16, 2015 which indicates that he had retained new counsel *prior to* filing his Notice of Appeal. (attached heretofore as "Exhibit A"). Additionally, Appellant is a Plaintiff in a personal injury case, therefore there is no substantial risk that he will be required to, "pay another attorney to become familiar with a case and repeat preparatory actions already completed." Hagood at 197. The absence of any deprivation of a substantial right of the Appellant is precisely what the Enersys Court found when it held an order denying disqualification of an attorney was not immediately appealable, "we find here that the policy considerations that drove our holding in Hagood [...] are no implicated." "We therefore find no substantial right has been affected by the order, and thus subsection (2) of section 14-3-330 is inapplicable." Enersys at 618-619.

For the foregoing reasons, the present case is distinguishable from Hagood and is more similar to Wilson and Enersys. The Order at issue did not “discontinue the action, or prevent a judgment from which an appeal might be taken,” and, as in Wilson it did not deprive the appellant of a substantial right as perceived of in Hagood. Therefore, the Court should hold that an Order Relieving Counsel is not immediately appealable under S.C. Code Ann. § 14-3-330.

CONCLUSION

Respondent respectfully submits that an Order Relieving Counsel is not immediately appealable because it neither ends the action, nor prevents the Appellant from pursuing his case to a Judgment from which an appeal might be taken, and because it does not deprive the Appellant of a substantial right.

Respectfully submitted,



Frank C. Swaggard
Wukela Law Firm
Post Office Box 13057
Florence, South Carolina 29504
(843) 669-5634
S. C. Bar #79082

May 11, 2015

EXHIBIT

A

JUDGE CRAIG BROWN
 FLORENCE COUNTY COURT
 1205 N IRBY ST
 FLORENCE, SC

MARCH 16, 2015

DAVID BETHEA C/A NO13-CR-21-2724
 V
 DAVIS

DEAR HON. CRAIG BROWN
 AS PER YOUR OR TO RETAIN COUNSEL
 I RETAINED COCKRELL LAW FIRM
 159 MAIN ST CHESTERFIELD, SC 29709
 ON MARCH 16 I WAS DENIED THE RIGHT
 TO REVIEW AND COPY MY FILE'S,
 THE FIRM WITH DREW UNTIL I SET UP
 AN APPOINT WITH ANOTHER LAWYER IN THE FIRM
 I SIGNED A RETAINER ON THE 12 OF MARCH
 I REQUEST THE COURT TO ORDER THE COCKRELL
 LAW FIRM TO RELEASE MY FILE'S TO ME
 YOURS TRULY
 DAVID BETHEA
 David Bethea

HANDED DELIVERED
 #03 Room UNDER DOOR
 AS DIRECTED

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Appellate Case No. 2015-000563

RECEIVED
MAY 12 2015
SC Court of Appeals

David Bethea, Appellant,

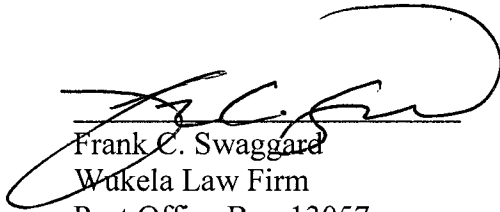
v.

Stefon Davis, Respondent.

PROOF OF SERVICE

I certify that I have served the Memorandum of Appealability on Stefon Davis, by depositing a copy of it in the United States Mail, postage prepaid, on May 11, 2015 addressed to his attorney of record, Robert Thomas King, Esquire of King, Love, & Smith, LLC, Post Office Box 1764, Florence, South Carolina 29503 and David Bethea, PO Box 1861, Bennettsville, SC 29512.

May 11, 2015


Frank C. Swaggard
Wukela Law Firm
Post Office Box 13057
Florence, South Carolina 29504
(843) 669-5634
South Carolina Bar No. 79082

WUKELA LAW FIRM

Steve Wukela, Jr.
Benjamin D. Moore
Christi B. McDaniel
Stephen J. Wukela
Patrick J. McLaughlin
Pheobe A. Clark
Frank C. Swaggard
Jason B. Turnblad
E. Katherine Moore

403 Second Loop Road
P.O. Box 13057
Florence, SC 29504-3057

(843) 669-5634
FAX (843) 669-5150

May 11, 2015

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

RECEIVED
MAY 12 2015
SC Court of Appeals

Re: David Bethea v. Stefon Davis,
Appellate Case No. 2015-000563

Dear Ms. Kitchings:

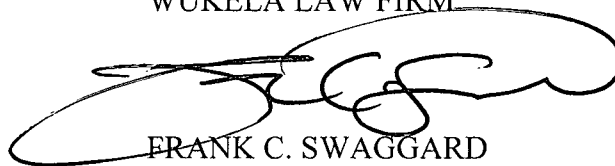
Enclosed for filing are an original and seven copies of the Memorandum of Appealability, along with my Proof of Service. I would appreciate your certifying a copy and returning it to me in the envelope provided.

I am, by copy of this letter, serving counsel for the Respondent and the Appellant with a copy of this Memorandum of Appealability.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM



FRANK C. SWAGGARD

cc: Robert Thomas King, Esquire
David Bethea

ST • CLAS

IRST • CLAS

IRST • CLAS

IRST • CLAS

IRST • CLAS



First Class Mail

WUKELA LAW FIRM
 403 SECOND LOOP ROAD
 P.O. BOX 13057
 FLORENCE, SC 29504

RECEIVED
 MAY 12 2015
 SC Court of Appeals

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