

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

Appeal from Berkeley County
Court of Common Pleas

Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-CP-08-1458
Appellate Case No. 2015-000621

Christine Sturgis,

RESPONDENT,

v.

Amy Fuller, Ashley Grech, Carol Bartlett,
and Katie Stapleton (In Their Individual
Capacities),

APPELLANTS.

RESPONDENT'S MEMORANDUM ON ISSUE OF APPEALABILITY

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I. STATEMENT OF THE CASE

The Respondent filed a Summons and Complaint, on June 19, 2014, and served the Appellants' with her discovery requests on June 27, 2014, to which the Appellants' filed a Joint Motion to Dismiss, or in the Alternative, for a More Definite Statement on August 25, 2014. In an attempt to resolve this matter, the Respondent amended her lawsuit on September 16, 2014. On November 5, 2014, the Appellants' filed another Motion to Dismiss Respondent's Amended Complaint, or in the Alternative, Motion for a More Definite Statement.

On January 12, 2015, the parties convened a Motion hearing before the state court, in connection with the Appellants' Motion to Dismiss. At the hearing, the Court denied the Appellants' Motion to Dismiss. As a result the Appellants', on or about January 22, 2015, served the Respondent with a Motion to Alter or Amend Judgment Pursuant to Rules 52(b) and 59(c) of the South Carolina Rules of Civil Procedure. The Respondent responded with a Memorandum in Opposition to the Appellants' Motion to Alter or Amended, which was filed with the Berkeley County Clerk of Court on February 9, 2015.

On March 5, 2015, Judge J.C. Nicholson, Jr. upheld the denial of the Appellants' Motion to Dismiss. The Appellants' filed an Appeal with the South Carolina Court of Appeals, and served it on the Respondent, on or about March 18, 2015. The Respondent, for the following reasons, state that Judge Nicholson's ruling is not an appealable issue and the Appellants' Appeal should be dismissed.

II. ARGUMENT

A. THE COURT'S DENIAL OF THE APPELLANTS' MOTION TO DISMISS IS NOT APPEALABLE; THEREFORE, APPELLANTS' APPEAL SHOULD BE DISMISSED.

The Supreme Court of South Carolina, and the South Carolina Court of Appeals, have clearly stated that a Rule 12(b)(6) motion (Motion to Dismiss), is not appealable. “[T]he motion to dismiss has the effect of asserting that respondent has failed to state a cause of action.”

McLendon v South Carolina Department of Highways and Public Trans, 442 S.E.2d 539, 540 (S.C. 1994). “The denial of such a motion is not immediately appealable under S.C. Code Ann. § 14-3-330 (1976 & Supp. 1993).” *Id.* (quoting *Moyd v Johnson*, 289 S.C. 482, 347 S.E.2d 97 (1986)). The Court in *McLendon* referenced the case *Ballenger v Bowen*, 443 S.E.2d 379 (S.C. 1994), and even though the *Ballenger* case addresses the issue of summary judgment, the Court in *McLendon* felt it necessary to make its ruling (on a Motion to Dismiss) based off of the *Ballenger* case.

The Court in *Ballenger* stated, “A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial.” *Ballenger*, 443 S.E.2d 379, 380 (S.C. 1994). (quoting *Parker Oil Co v Smith*, 34 N.C.App. 324, 237 S.E.2d 882 (1977)); cf. *Geiger v Carolina Pool Equipment Distributors, Inc*, supra. “The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict.” *Id.* (quoting *Johnston v Bowen*, 437 S.E.2d 45 (1993) (motion to reconsider)). “In short, the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Therefore, the order

denying a motion for summary judgment is not appealable.” *Id.* (quoting *Good v Hartford Accident & Indemnity Co* , 201 S.C. 32, 21 S.E.2d 209 (1942)).

Similar to the *McLendon* case (which addressed the issue of a Motion to Dismiss for failure to state a Cause of Action), the present case also addresses the same issue, therefore the Respondent requests that the Court of Appeals also apply the *Ballenger* case. Similar to Summary Judgment motions, the denial of a Motion to Dismiss is not a final determination of anything, and further, it does not strike any defense, and the Appellants’ in this case can raise the same defense later in the proceedings.

The Respondent is aware that there are some instances where the Court of Appeals can review certain cases. The *Morris v Anderson County*, 564 S.E.2d 649 (S.C. 2007) case stated that, “a Court may, as a matter of discretion consider an unappealable order when such a ruling would avoid unnecessary litigation.” To support its statement the Court in *Morris* cited, *Roberts v Recovery Bureau, Inc* , 316 S.C. 492, 450 S.E.2d 616 (Ct.App.1994)). However, the *Roberts* case is not similar to the present case.

Contrary to the present case, the *Roberts* case concerned, “the Appellant (Roberts) [who] moved for summary judgment on the issue of liability against Smith (a Respondent) under the doctrine of offensive non-mutual collateral estoppel, relying on the jury verdict against Smith in the *Lovern v Smith* trial. The trial judge denied the motion, relying on Restatement (Second) of Judgments § 29(3) and cmt. e (1982). He [the trial judge] held that Roberts’ failure to join in the *Lovern* trial or have the actions tried together, thereby seeking to enjoy the benefits of a favorable outcome but avoid the risk of an unfavorable one, precluded her from relying on offensive nonmutual collateral estoppel against Smith.” *Roberts*, 450 S.E.2d 616, 618 (S.C. App. 1994). “Recovery (a Respondent) also moved for summary judgment on the basis of

defensive nonmutual collateral estoppel, arguing principally that nothing indicated Roberts intended to present any different evidence or arguments on the issue of Recovery Bureau's liability and that the facts and law are identical to the *Lovern* Case. The trial judge found that Roberts, although not a party to the *Lovern* trial, was in privity with *Lovern* on the issue of Recovery Bureau's liability. He therefore granted Recovery Bureau's motion for summary judgment." *Roberts*, 450 S.E.2d 616, 619 (S.C.App.1994). However, the Court of Appeals of South Carolina held that, "Roberts never had a full and fair opportunity to litigate the issue of Recovery Bureau's liability. While Roberts clearly has an interest almost identical to that of *Lovern*, she is not in privity with *Lovern* and due process precludes the use of collateral estoppels in this instance." *Id.* Unlike the *Roberts* case, where the Court overturned the lower Court's holding (of granting a Summary Judgment) because Roberts did not have an opportunity to litigate the issues, the Appellants', in the present Case, will have a full and fair opportunity to litigate this case.

Further, the *Roberts* case dealt with the Doctrine of Offensive Nonmutual Collateral Estoppel, and under this Doctrine, "a party may be prevented from relitigating an issue which was actually litigated and directly determined in a prior action if the party had a full and fair opportunity to litigate the issues in the first action and there are no circumstances which justify affording him a second opportunity to retry the issue." *Roberts*, 450 S.E.2d 616, 619 (S.C.App.1994). Here, the Appellants' do not meet this exception, because the Appellants' are not prevented from litigating this case, and as the *Huntley v Young* case held, "[t]he denial of a Rule 12(b)(6) motion does not establish the law of the case nor does it preclude a party from raising the issue at a later point or points in the case." *Huntley*, 462 S.E.2d 860 (S.C. 1995).

“Currently, this Court does not allow immediate appellate review of the denial of any Rule 12(b), SCRCP motion.” *Breland v Love Chevrolet Old, Inc* , 529 S.E.2d 11, 16 (S.C. 2000). See *Woodard v Westvaco Corp* , 319 S.C. 240, 460 S.E.2d 392 (1995) (ruling the denial of a Rule 12(b)(1), SCRCP motion was not immediately appealable); *Mid-State Distribs , Inc v Century Importers, Inc* , 310 S C. 330, 426 S.E.2d 777 (1993). “The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted.” *Id.* See *Knowles v Standard Sav and Loan Ass’n*, 274 S.C. 58, 261 S.E.2d 49 (1979) (ruling a denial of a pretrial class certification was not immediately appealable).

Therefore, the Appellants’ appeal should be denied, because they do not meet any of the exceptions that would allow the Court to hear the unappealable order from the state court. Further, the Appellants’ rights would not be substantially impacted and, similar to the *Breland* case, an immediate review of this case would be a piecemeal litigation.

B. AN APPELLATE COURT DOES NOT NEED TO REVIEW THE REMAINING ISSUES WHEN PRIOR ISSUES ARE DISPOSITIVE OF THE APPEAL

In *Burkey v Noce* 726 S E.2d 229 (S.C.App.2012), the South Carolina Court of Appeals cited *Futch v McAllister Towing of Georgetown, Inc* , 335 S.C. 598, 518 S.E.2d 591, 598 (1999), concerning the Appellate Court’s holding that it did not need to address the remaining issues in that case because the prior issue (the appeal of the Rule 12(b)(6)) was dispositive of the appeal. After the Court, in the *Futch* case, reversed the Court of Appeals holding, the Court stated that, “it was not necessary to address Futch’s remaining issues [in light of their disposition of the case].” *Futch*, 518 S.E.2d 591, 606 (S.C. 1999). Similarly, the *Whiteside v Cherokee County*

School Dist No One, 428 S.E.2d 886, 889 (S.C. 1992), held that, “[i]n view of our disposition of this issue, we need not address appellants’ remaining exception.”

Here, it is clear that this Court should not hear this case because a Rule 12(b)(6), SCRPC, ruling is not immediately appealable, and the Appellants’ fail to meet any exception to this argument. As a result, the Court does not need to address the issues presented by the Appellants’.

III. CONCLUSION

Based on the foregoing, the Respondent respectfully submits that the Court of Appeals should not hear this case, because the denial of a Motion to Dismiss under Rule 12(b)(6), SCRPC is not immediately appealable. Further, the Court of Appeals, because the previous issue is dispositive, does not need to address any other issues presented by the Appellants’ in this case.

CERTIFICATE OF COUNSEL

The undersigned certified that this Memorandum on Issue of Appealability complies with Rule 211(b), SCACR.

April 10, 2015



Donald Gist

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I hereby certify that on April 10, 2015, I served a copy of the Memorandum on Issue of Appealability on the following:

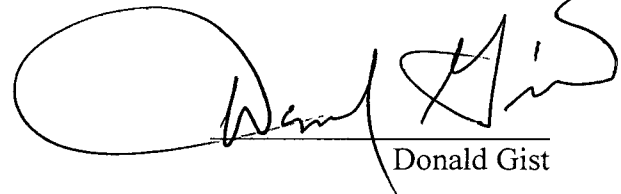
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