THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Maité Murphy, Circuit Court Judge

S.C. Ct. App. Order filed Feb. 5, 2015

Jasper County, Respondent,

v.

The Settings of Mackay Point, LLC and Bond Safeguard Insurance Company, Defendants,

Of which Bond Safeguard Insurance Company is Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that Petitioner filed a petition for rehearing and that the Court of Appeals finally ruled on the petition on May 6, 2015.

QUESTIONS PRESENTED

Do our state's appellate courts have jurisdiction under South Carolina Code section 14-3-330 to review an order denying a stay that, under the peculiar circumstances of the case, involves the merits and effectively strikes defenses?

If so, did the Court of Appeals erroneously dismiss the appeal of an order denying stay that, under the peculiar circumstances of the case, involved the merits of the case and effectively struck some of Petitioner's defenses?

STATEMENT OF THE CASE

Petitioner Bond Safeguard Insurance Company asks that this Court decide novel questions of law about the extent of the appellate jurisdiction conferred by South Carolina Code section 14-3-330 and when litigants are to appeal orders covered by that statute.

This appeal arises from a dispute involving the development of a neighborhood along the Pocotaligo River. The Settings at Mackay Point, LLC ("Mackay Point, LLC") was the developer. (App. p. 24). In 2006, Mackay Point, LLC and Jasper County entered into a development agreement for the project. (App. pp. 32-78). In that agreement, Mackay Point, LLC agreed to build infrastructure for the neighborhood's several phases, at a pace that would be "dictated largely by market conditions." (App. p. 77).

Bond Safeguard was Mackay Point, LLC's surety. (App. p. 24). It issued five bonds. Each related to a specific aspect of the project. (App. pp. 95-96). For example, Bond No. 5025755 covered infrastructure for Phase II West of the neighborhood. (App. p. 79).

The development agreement has a ten-year term but provides that "[d]evelopment activity may occur faster or slower than the forecast schedule, as a matter of right, depending upon market conditions." (App. p. 77). Those conditions turned out to be infamously poor. The 2008 housing market crisis pushed South Carolina's development industry into what the General Assembly twice described as "a state of economic emergency" that affected "none as severely as the state's . . . real estate[] and construction sectors." (App. pp. 82, 89). The proposed neighborhood suffered. (App. pp. 25, 28). Only three of Phase II West's 101 lots were ever sold. (App. p. 112). The last of those sales took place in November 2007, and Bond Safeguard and Mackay Point, LLC later bought back the lots. (App. pp. 112-13).

Jasper County's Lawsuit

In 2010, Jasper County sued Bond Safeguard and Mackay Point, LLC. (App. pp. 91-97). The County alleged that Mackay Point, LLC failed to develop the neighborhood and that as a result, Bond Safeguard must either pay the County the penal sums of the bonds or perform the work covered by the bonds. (App. pp. 91-97). Parts of the case have been resolved, but the bond for Phase II West, which has a penal sum of $3,049,161.14, is still in dispute. (App. pp. 27, 79).

Lot 228

A number of Bond Safeguard's defenses hinge on the fact that it and Mackay Point, LLC own all the Phase II West lots. Because there is no demand to develop that phase, there is no obligation to build infrastructure; in any event, building the infrastructure for that phase would be wasteful and paying out the bond would give the County an undeserved windfall. Bond Safeguard has taken that position throughout this case. (App. pp. 103-04, 112-13, 136, 139-40).

Lot 228 is a lot in Phase II West. (App. p. 28). In 2014, Bond Safeguard learned that a deed had been filed in the Jasper County Register of Deeds' office purporting to show that Mackay Point, LLC sold Lot 228 to a company called Consolidated Ventures, LLC. (App. pp. 28, 179-81). Bond Safeguard conferred with Mackay Point, LLC, which confirmed it had not sold or deeded away Lot 228. (App. pp. 183-84).

Bond Safeguard then learned that Consolidated Ventures is controlled by Robert Wolfson. (App. pp. 28-29). While Jasper County's case was pending, Wolfson became the mortgagee on the neighborhood's site. (App. pp. 26, 29). Also, at Jasper County's request,

Wolfson attended a mediation between the County and Bond Safeguard, in which the parties discussed Bond Safeguard's defenses regarding Phase II West. (App. p. 27). That mediation took place before the purported sale of Lot 228 to Wolfson's company. (App. pp. 27, 179-81).

Bond Safeguard and Mackay Point, LLC concluded that Consolidated Ventures' deed is invalid and is the product of a fraudulent conveyance aimed at undermining Bond Safeguard's defenses in the County's lawsuit. (App. pp. 23, 29-30, 183-84). In order for Mackay Point, LLC to protect its property rights to Lot 228, and for Bond Safeguard to combat a manipulation of the evidence in the County's lawsuit, they filed a complaint against Consolidated Ventures, Wolfson, and others on November 14, 2014 (the "Lot 228 Lawsuit"). (App. pp. 182-201). In their complaint, Bond Safeguard and Mackay Point, LLC asked the circuit court to set aside the deed to Consolidated Ventures and declare Mackay Point, LLC the sole owner of Lot 228. (App. p. 200-01).

Bond Safeguard's Motion to Stay

On November 18, 2014, the circuit court held a hearing in Jasper County's case. (App. p. 206). At the hearing, Bond Safeguard made a motion to stay the case. Bond Safeguard explained that the ownership of Lot 228 is a crucial part of its defenses to Jasper County's claims. (App. p. 206). It further explained that it had only recently completed its investigation of the deed purporting to convey Lot 228 and that it and Mackay Point, LLC had filed the Lot 228 Lawsuit in order to preserve Bond Safeguard's defenses and to restore Mackay Point, LLC's ownership. (App. p. 206).

On December 1, 2014, the circuit court summarily denied Bond Safeguard's motion

for stay. (App. p. 208). Bond Safeguard appealed. (App. p. 7).

Proceedings on Appeal

Before merits briefing began, Jasper County moved to dismiss the appeal. It argued the circuit court's denial of stay is not appealable under subsections (1) or (2) of South Carolina Code section 14-3-330. (App. pp. 8-13). Bond Safeguard filed a return, explaining that the order is appealable under subsections (1) and (2)(c). (App. pp. 14-208). By denying the motion to stay, the circuit court prevented Bond Safeguard from obtaining the relief it needs from the Lot 228 Lawsuit in order to present many of its defenses at a trial of Jasper County's case. (App. pp. 19-22). In effect, then, denying the stay stripped Bond Safeguard of those defenses. (App. pp. 19-22). Thus, because the order has the effect of finally determining a key part of those defenses, the order involves the merits and is thus appealable under subsection 14-3-330(1). (App. pp. 19-20). Further, as the order effectively removed material issues from the case, it is an order that strikes out part of an answer or a pleading and is thus appealable under subsection 14-3-330(2)(c). (App. pp. 20-22).

The Court of Appeals held the order unappealable and dismissed the appeal. (App. p. 4). However, the Court failed to explain its basis for that holding. The Court did not make clear whether it believes that denials of stay are categorically unappealable or if, instead, it believes that such orders can be appealable, but the one in this case is not. In its petition for rehearing, Bond Safeguard asked the Court to at least clarify the reasoning behind its ruling on a matter of first impression—the appealability of an order denying stay. (App. pp. 209-218). With even less explanation than before, the Court denied the petition. (App. p. 6).

ARGUMENTS

Bond Safeguard has appealed a circuit court order that, under the peculiar circumstances in this case, effectively decided the merits of, and struck, defenses to a $3 million bond claim. However, this appeal is no longer just about correcting an improper decision that affects only one case. By erroneously dismissing the appeal, the Court of Appeals has raised novel questions about appellate jurisdiction and procedure that are important to the proper functioning of our state's court system. This Court should grant certiorari so that it can answer those questions and, in so doing, remedy the Court of Appeals' improper dismissal of an appealable order.

I. The Court of Appeals' Dismissal Raises Important, Novel Questions About the Contours of Appellate Jurisdiction Under Section 14-3-330 and the Timing of Appeals.

There are special and important reasons to review the Court of Appeals' erroneous dismissal of the appeal. *See* Rule 242(b), SCACR. This Court has considered orders granting a stay and lifting a stay and held that they were not appealable. *See Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm'n*, 373 S.C. 96, 98, 644 S.E.2d 681, 682 (2007) (per curiam) (order lifting stay); *Edwards v. SunCom*, 369 S.C. 91, 95, 631 S.E.2d 529, 531 (2006) (order granting stay). However, neither this Court nor the Court of Appeals has ever issued a published opinion stating whether orders *denying* stays can be appealable or explaining what types of circumstances can make such orders appealable. Accordingly, the Court of Appeals' dismissal raises novel questions about appealability under section 14-3-330. *See* Rule 242(b)(1), SCACR.

This Court should answer those questions. They involve two concepts that are

indispensable to a properly functioning court system: clarity in the extent of our courts' appellate jurisdiction, and certainty in appellate procedure.

Most interlocutory orders are not appealable unless they fit into one of the categories of orders provided in section 14-3-330. *See, e.g.*, *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004). For that reason, section 14-3-330 is often referred to as "the appealability statute," a title which suggests that section 14-3-330 defines litigants' power to file appeals. But section 14-3-330 is a jurisdictional statute—that is, it defines the power of courts to engage in appellate review. Accordingly, the question of whether an order is appealable under section 14-3-330 is really a question about our appellate courts' power. The answer determines whether this Court may—and whether the Court of Appeals must—engage in appellate review of an order. Few cases are more "special and important" than one involving a question of whether our appellate courts have the power to act.

The scope of that power permeates the second concept at issue here: when a litigant may, or must, appeal an order denying a motion to stay. In many instances, appealable orders may be appealed immediately or after final judgment. Indeed, subsection 14-3-330(1) explicitly provides those options for orders that "involve[e] the merits." However, for reasons of public policy, some rulings that fall under subsection 14-3-330(2) must be appealed immediately; waiting until final judgment is too late. *See, e.g.*, *Neeltec Enters., Inc. v. Long*, 397 S.C. 563, 567, 725 S.E.2d 926, 928 (2012) (order requiring plaintiffs to substitute defendants); *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 452-53, 661 S.E.2d 81, 87 (2008) (order setting opt-in method for class-action claims); *Hagood v. Sommerville*, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) (order disqualifying party's lawyer); *Creed v.*

Stokes, 285 S.C. 542, 542, 331 S.E.2d 351, 352 (1985) (order referring case to master in equity).

The available time(s) for appealing a ruling can dictate both a litigant's appellate rights and the strategy for proceeding at the trial level after the ruling is issued. *See* Hon. Alex M. Sanders, Jr. & John S. Nichols, *Trial Handbook for South Carolina Lawyers* § 10.12 (2014-2015 ed.). When a circuit court makes an erroneous pretrial ruling, litigants and their lawyers need to know when to ask an appellate court to intervene—can they wait until the case is over, or must they appeal immediately? Bond Safeguard believes that, under the extraordinary and peculiar circumstances of this case, the circuit court's order must—or at least may—be appealed immediately. Jasper County believes Bond Safeguard must wait until final judgment. However, the parties' positions do not matter at this stage. What matters is that no published opinion says whether either side is even half right. The question of when someone must appeal is unusually important because of its foundational nature in the appellate process, and because the issue involves the even greater question of how far our appellate courts' jurisdiction extends. These are precisely the kinds of questions this Court is meant to answer. The Court should grant certiorari.

II. The Court of Appeals Improperly Held that the Circuit Court's Order Is Not Appealable Under South Carolina Code Section 14-3-330.

This petition provides more than an invitation for this Court to answer significant questions about appellate jurisdiction. It presents an opportunity for this Court to correct the Court of Appeals' flawed understanding of its own jurisdiction. As mentioned above, the Court of Appeals refused to clarify whether its decision was based on a categorical view of

orders denying stays or instead was the result of a case-specific analysis of the circuit court's order. Either way, the Court was wrong.

A. Under Both Subsections 14-3-330(1) and (2)(c), Appealability Is a Case-Specific, Effects-Focused Inquiry.

First, to the extent that the Court of Appeals believed that denials of stay are categorically not appealable before final judgment, that position conflicts with both the language of section 14-3-330 and with prior decisions of this Court interpreting that statute. *See* Rule 242(b)(3), SCACR. As to subsection 14-3-330(1), it provides jurisdiction to review [*a*]*ny* intermediate . . . order . . . in a law case involving the merits in actions commenced in the court of common pleas." (emphasis added). The use of "[a]ny" shows that no type of order is categorically unappealable. Instead, the question is whether the order involves the merits—a criterion that contemplates evaluating the effect of the order on specific issues raised in the case. This Court has recognized that, stating an order "involv[es] the merits" under subsection 14-3-330(1) if it "finally determines some substantial matter forming the whole or a part of some cause of action or defense" raised in the case. *E.g.*, *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Thus, the appealability analysis must be case-specific and focus on the effect of the order, rather than its form. To the extent the Court of Appeals believes that orders denying stay never involve the merits, that position is erroneous and conflicts with this Court's precedent.

The same is true for subsection 14-3-330(2)(c), which provides jurisdiction to review orders that strike out all or part of a pleading. On numerous occasions, this Court has analyzed the appealability of orders under that provision by analyzing the orders' effects,

rather than their labels. *See, e.g.*, *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (finding order relieving defendant from default on basis of improper service was appealable because it had "the effect" of dismissal under Rule 12(b)(5), SCRCP, and thus ended the action as to that defendant); *see also Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303-04, 705 S.E.2d 475, 478-79 (Ct. App. 2011) (collecting *Wetzel* and other Supreme Court cases showing that, in order to determine appealability under subsection 14-3-330(2)(c), an appellate court should look to the effect of the order rather than to its title). In fact, even in *Edwards*, which involved an order granting a stay, this Court determined appealability under subsection 14-3-330(2)(c) by looking to the order's effect. *Edwards*, 369 S.C. at 94-95, 631 S.E.2d 530-31. Thus, a categorical approach to appealability conflicts with this Court's applications of subsection 14-3-330(2)(c).

B. By Holding that the Circuit Court's Order Is Not Appealable, the Court of Appeals Improperly Construed Its Appellate Jurisdiction Too Narrowly.

Even if the Court of Appeals did use the correct, effects-based analytical framework to decide whether it has jurisdiction to review the circuit court's order, the Court still reached the incorrect result. As Bond Safeguard explained in its return and rehearing petition to the Court of Appeals, the fraudulent transfer of Lot 228 guts several of Bond Safeguard's defenses, but the ownership of Lot 228 cannot be resolved inside the confines of Jasper County's lawsuit. By denying Bond Safeguard the opportunity to resolve that issue, the circuit court effectively removed from the case all defenses affected by the dispute over Lot 228. (App. pp. 19-22, 214-18). That effect makes the order fall under subsections (1) and (2)(c) of section 14-3-330, which means that the Court of Appeals had jurisdiction to review

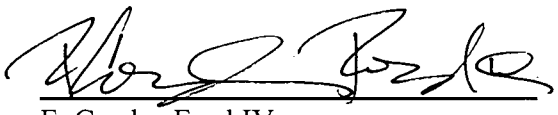
the order.

A court's erroneous decision about the contours of its jurisdiction is a serious error. The error is all the more grave here because, unlike this Court, the Court of Appeals has no discretion to decline review of appealable orders. *See, e.g.*, Rule 201(a), SCACR. Indeed, section 14-3-330 requires that the Court "shall review" appealable orders. Thus, even putting aside the novel quality of the questions presented and the apparent conflict of the Court of Appeals' dismissal with this Court's precedent, certiorari is warranted here because of the singularly important need to address what the Court of Appeals can and cannot do.

CONCLUSION

Bond Safeguard asks that this Court issue a writ of certiorari so that it can review the merits of, and reverse, the Court of Appeals' improper dismissal of Bond Safeguard's appeal.

Respectfully submitted this 2nd day of June, 2015.



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PROOF OF SERVICE

I certify that on June 2, 2015, I served the respondent with a copy of the Petition for a Writ of Certiorari and a copy of the Appendix by depositing them in the United States mail, postage prepaid, to the respondent's counsel at the following address:

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