IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2013-CP-42-3055
Appellate Case No.: 2015-000653

United Services Automobile Association, appearing and defending in the name of James Travis Singleton as underinsured motorist carrier pursuant to Section 38-77-160 of the South Carolina Code, ... Appellant,

v.

John Davis and Jane Davis, ... Respondents.

APPELLANT USAA'S
REPLY MEMORANDUM IN SUPPORT OF ITS
PETITION FOR REHEARING
OF ORDER OF DISMISSAL

Appellant United Services Automobile Association (USAA), appearing and defending in the name of James Travis Singleton as underinsured motorist carrier pursuant to Section 38-77-160 of the South Carolina Code, submits the following Reply Memorandum in support of its Petition for Rehearing of this Court's Order dismissing the above-captioned appeal. For the following reasons, Respondents' arguments should be rejected and this Court should reinstate USAA's appeal.

ARGUMENT

I. USAA's initial brief was not untimely.

Respondents argument that initial briefs were untimely is without merit. In the first place, this Court did not ever make a finding that initial briefs were overdue. Failure to file timely initial briefs was not cited as a ground for dismissal of the consolidated appeals. Moreover, the deadline for filing initial briefs had not yet arrived when this Court dismissed the appeals *sua sponte*.

Rule 208(a)(1) of the South Carolina Rules of Appellate Procedure provides that the Appellant must file its initial brief within 30 days of "receipt of the transcript." In this case, the application of this Rule was in doubt because counsel for Respondents had apparently ordered and received the original transcript and attached it to a motion filed with the trial court. However, Singleton and USAA, appearing and defending in the name of Singleton as underinsured motorist carrier (hereinafter "UIM counsel"), did not receive an original transcript, and could not be required to take Respondents' word for its authenticity, or to use a second-hand copy as the official transcript for their appeal.

UIM counsel ordered a copy of the transcript, and received a version stamped "copy" on April 16, 2015. Counsel was in doubt as to when the 30-day period for filing initial briefs began under these circumstances and sought clarification from the Court. Counsel was told by the Clerk that the Appellants should investigate and inform the court when they were satisfied they had received the official transcript. Counsel did not receive the original transcript until May 5, 2015. The deadline, which is 30 days from receipt of the transcript, had not yet arrived when this Court dismissed the appeals.

This Court did not dismiss the appeals due to failure to timely file initial briefs. Because there, at a minimum, questions as to the proper application as to when the 30-day period began, this Court should reject Respondents' argument. See McComas v. Ross, 368 S.C. 59, 64, 626 S.E.2d 902, 904-05 (Ct. App. 2006) (holding that dismissal for failure to prosecute is too harsh a sanction in the absence of a clear record of delays, contemptuous conduct, or unreasonable neglect).

II. USAA's Petition for Rehearing was not improper.

Respondents' argument that USAA's Petition for Rehearing was not in proper form is also without merit. Rule 221(a) of the South Carolina Rules of Appellate Procedure does not specify any specific format for petitions for rehearing. The rule merely refers the parties to Rule 240, SCACR, which is the rule for motions. Together, these rules require the petitioner to state with particularity the grounds for its motion, and to provide supporting legal authorities. USAA's Petition accomplished these things.

This Court should reject Respondents' proposed hyper-technical reading of the Rules. Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (holding that South Carolina public policy favors disposition of cases on the merits, rather than on technicalities); Carson v. CSX Transp., Inc., 400 S.C. 221, 231, 734 S.E.2d 148, 153 (2012) (rejecting a hyper-technical interpretation of a statute). Moreover, Respondents cite no authority in support of their argument that USAA's Petition was procedurally defective. This court should therefore decide this appeal on the merits. State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (refusing to consider an issue raised in a conclusory manner without supporting authority).

III. USAA does not lack standing to seek rehearing of the dismissal of its appeal.

Respondents' argument that USAA lacks standing to petition for rehearing of the dismissal of its own appeal is baseless. This Court did not dismiss USAA as a party. The order merely consolidated the appeals. (See Correspondence dated April 21, 2015, attached as Exh. A to Respondents' Return.)

IV. Respondents' arguments relating to the merits are not properly before the Court in this context.

In the current procedural posture, the only issue pending before this Court is Appellants' Petition for Hearing to reinstate their appeals. This Court's Order cites only one ground for dismissal—the interlocutory nature of the appeals.

The Rules of Appellate Procedure provide that the Appellants are entitled to brief the issues on appeal in their initial briefs. See Rule 208, SCACR. As Respondents admit, initial briefs have not yet been filed in this case. Furthermore, the Record on Appeal has not yet been filed.

This Court's review of the merits is limited to grounds appearing in the Record on Appeal. Rule 210(h); 220(c). This Court should therefore reject Respondents' attempt to put the merits of the appeal at issue in this context.[1] A decision on the merits in this context would violate Appellants' basic due process rights of notice and opportunity to be heard. See Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."); S.C. Const. art. 1, §

[1] Solely for the purpose of preventing a waiver argument, USAA would point out in response to Respondents' issue preservation argument that, as Respondents admit, the only defendant in this case is Singleton. Respondents cite no authority for the proposition that UIM counsel, appearing and defending in the name of the underinsured motorist, must separately argue and obtain rulings in order to preserve issues for appeal. Respondents' proposed requirement would tend to interfere with, rather than promote, judicial efficiency.

22. Accordingly, USAA respectfully requests that, should this Court be inclined to decide this Petition on some ground relating to the merits of this appeal, the parties be afforded proper notice and the opportunity to fully brief these matters in compliance with the Rules of Appellate procedure before any decision is rendered.

V. The circumstances of this case warrant an interlocutory appeal.

By statute, appellate courts have jurisdiction over "[a]ny intermediate judgment, order or decree in a law case involving the merits . . . and final judgment in such actions." S.C. Code Ann. § 14-3-330(1). The inclusion of both "intermediate judgment" and "final judgment" in the statute indicates clear legislative intent that some interlocutory orders are appealable, so long as they "involve the merits."

The Supreme Court construed the phrase "involve the merits" for purposes of appellate jurisdiction to embrace more that simply the questions of law or fact constituting the causes of action and defenses in the case. Blakely & Copeland v. Frazier, 11 S.C. 122, 134 (1878). "The word 'merits' naturally bears the sense of including all that the party may claim of right in reference to his case." Id. The court concluded that "whenever a substantial right of the party to an action material to obtaining a judgment in such action is denied, a right of appeal lies . . . ." Id. at 135. Blakely & Copeland has never been expressly overruled.

In recent cases, the court has construed "involve the merits" more narrowly. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006). Under these cases, an order is not appealable if there is some further act that must be done by the trial court prior to determination of the rights of the parties.

Courts have held that discovery orders generally are not appealable, including orders compelling production of privileged material. Tucker v. Honda of S.C. Mfg., Inc., 354 S.C. 577, 582 S.E.2d 406-07 (2003); Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc., 381 S.C. 332, 333, 673 S.E.2d 417, 418 (2009) (Mem). However, in neither of these cases were the orders at issue independent of the merits.

In Wieters, the privileged material sought was at the heart of the plaintiff's case. The plaintiff, a physician, sued a hospital for defamation and conspiracy arising from the suspension of his staff privileges and subsequent reporting to the National Practitioner Data Bank. Wieters v. Bon-Secourts-St. Francis Xavier Hosp., Inc., 378 S.C. 160, 163, 662 S.E.2d 430, 432 (Ct. App. 2008). Counsel for the hospitals instructed deponents not to answer questions concerning what led to the suspensions of other physicians. Id. at 163, 662 S.E.2d at 432. The discovery sought was intertwined with the merits because it directly related to the ability of the parties to prepare for trial. Wallace v. Interamerican Trust Co., 246 S.C. 563, 568, 144 S.E.2d 813, 816 (1965); Wallace, 246 S.C. at 568, 144 S.E.2d at 816; Lowndes Prods., Inc. v. Brower, 262 S.C. 431, 433-34, 205 S.E.2d 184, 185 (1974). The facts and discovery order were apparently intertwined in Tucker also. Tucker, 354 S.C. at 576, 582 S.E.2d at 406.

However, when the material sought is separate and independent of the claims and defenses in the case, courts have recognized that an order compelling disclosure is effectively final. Ex parte Capital, 369 S.C. at 7-8, 630 S.E.2d at 468; Doe v. Howe, 362 S.C. 212, 217, 607 S.E.2d 354, 356 (Ct. App. 2004). The trial court order in these situations has the effect of revealing the very information for which protection is sought. Id.

Recent cases defining "involving the merits" in terms of the final resolution of some substantial matter forming the whole or a part of a cause of action or defense are in tension with the Supreme Court's declaration that litigants are statutorily entitled to appeal orders that effectively foreclose their substantial rights in matters that do not form a portion of either a cause of action or a defense. Compare Blakely & Copeland, 11 S.C. at 134 ("The word 'merits' naturally bears the sense of including all that the party may claim of right in reference to his case.") with Tucker, 354 S.C. at 576, 582 S.E.2d at 406 (limiting "involving the merits" to issues forming a whole or part of a cause of action or defense). Courts have recognized that orders that compel disclosure of protected information as to matters independent of the merits are appealable. Doe, 362 S.C. at 217, 607 S.E.2d at 356. In Doe, the protected information was the identity of the plaintiff, which is a matter independent of the claims and defenses in the professional negligence action in which the dispute arose.[2]

In this case, the requested discovery is independent of the merits. The information at issue is the joint defense agreement and related documents. (See USAA's Pet. for Reh'g, Exh. C.) This information is independent of the issues in the case, which involve only proximate cause and damages arising from a motor vehicle accident. (See id., Exh. A.)

Respondents' grounds for demanding the information serve only to underscore the independence of the substantial rights at issue. Respondents argue they have a right to know who is funding the defense. (Resp'ts. Return at 13.) This question is easily

[2] USAA has not argued that the trial court orders both do and do not "involve the merits," as represented by Respondents. (Resp'ts. Return, p. 10.) Under Doe, an interlocutory order that finally determines a substantial right that is *independent* of the merits, nevertheless "involv[es] the merits" for purposes of Section 14-3-330(1). Doe, 362 S.C. at 217, 607 S.E.2d at 356.

answered upon a review of the UIM statute. See S.C. Code Ann. § 38-77-160 (providing that an UIM carrier may appear and defend in the name of the underinsured motorist). Respondents also contend they need to know who retained Dr. David Price. (Resp'ts. Return at 13.) Yet Respondents admit they already have this information. (Id.) They are entitled to ask Dr. Price who retained him should they depose him. The question of Dr. Price's "credibility and bias" is a red herring. Regardless of which of the involved insurer's paid for his retention, he is an expert for the defense. See S.C. Code § 38-77-160. Thus, Respondents cannot identify any reason why the requested discovery is not independent of the merits.

Respondents also contend that USAA must disregard the trial court order and be held in contempt to be entitled to appeal. Neither Ex parte Capital nor Doe requires that a party be held in contempt in order to immediately appeal. Ex parte Capital, 369 S.C. at 8, 630 S.E.2d at 468; Doe, 362 S.C. at 217, 607 S.E.2d at 356. Moreover, contempt of court proceedings do not concern the issues in the disputed order. Instead, contempt of court is a sanction against the party or counsel for willful disobedience of a court order, carried out with specific intent and bad purpose to disobey or disregard the law. Ex parte Cannon, 385 S.C. 643, 660-61, 685 S.E.2d 814, 824 (Ct. App. 2009). The purpose of contempt of court proceedings is to punish offenses calculated to obstruct, degrade, and undermine the administration of justice. Id. at 661, 685 S.E.2d at 824. Contempt orders seek to coerce the defendant to do the thing required by the order. Id. at 662, 685 S.E.2d at 824. They can result in both civil fines and criminal penalties, including imprisonment. Id.

Contempt sanctions are a penalty imposed directly against the party for willful interference with the administration of justice. They are therefore not an option for a party who seeks to abide by the law. Contempt proceedings do not review the merits of the disobeyed order. As a result, the order at issue in this case is, for all practical intents and purposes, final. This Court should not require a litigant to engage in civil disobedience or criminal behavior simply to preserve protected information. Moreover, this construction would prejudice the statutory right of parties to appeal intermediate orders that involve the merits. Nothing in Section 14-3-330(1) requires a party to engage in willful contempt of the just administration of the courts simply to be entitled to an appeal. This Court should therefore decline to impose a construction that would require a party to engage in conduct courts seek to discourage and penalize as a prerequisite to access a right secured by statute.

Accordingly, this Court should reject Respondents' argument that jurisdiction is lacking to review this appeal. Appellant USAA therefore requests that this Court grant its petition for rehearing and reinstate its appeal.

Alternatively, even if this Court refuses to grant USAA's petition and reinstate its appeal, USAA requests that this Court mandate that the trial court comply with the procedure directed in Tucker. The trial court is required to conduct an *in camera* hearing to consider the applicability of the privilege. Tucker, 354 S.C. at 578, 582 S.E.2d at 407. The trial court never conducted such a hearing in this case, as required by the Supreme Court. Accordingly, USAA respectfully requests that this Court direct the trial court, upon remand, to conduct an *in camera* hearing in compliance with Tucker.

June 22, 2015

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

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Appellant,

v.

John Davis and Jane Davis

Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant USAA's Reply to Petition for Rehearing of Order of Dismissal upon John Davis and Jane Davis, via regular mail, on June 22, 2015, to their attorneys of record, E. Grey Wicker, Esq., and Michael E. Spears. Esq., of Michael Spears, P.A., P.O. Box 5806, Spartanburg, SC 29304. I further certify that I have served the Appellant USAA's Petition for Rehearing of Order of Dismissal upon Defendant Singleton, via regular mail, on June 11, 2015, via his attorney of record, Marcus K. McGarr, Esq., 108 Whitsett Street, Greenville, SC 29601.

June 22, 2015

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June 22, 2015

VIA USPS
The Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: John Davis and Jane Davis vs. James Travis Singleton

Civil Action No.:	2013-CP-42-3055
Appellate Case No.:	2015-000653
Claim No.:	1194455; ALIS #: 2013-10791
Date of Loss:	June 17, 2011
Our File No.:	3250-0693

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of Appellant USAA's Reply to Petition for Rehearing of Order of Dismissal and corresponding Certificate of Service.

I would appreciate your filing the originals of these documents, clocking the copies, and returning the same to me in the enclosed, self-addressed, stamped envelope provided for your convenience.

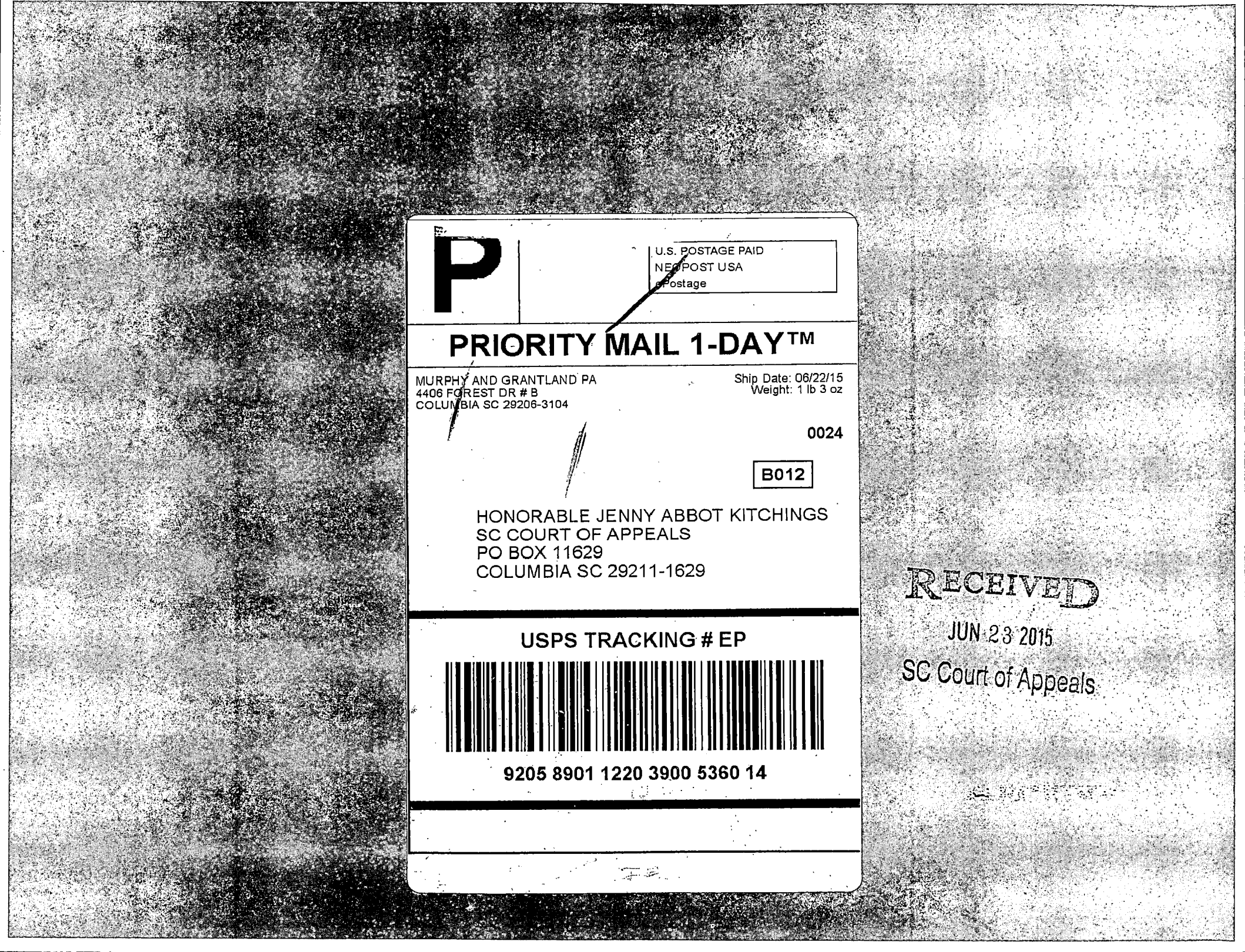
Also, please note that by copy of this letter, I am placing all counsel of record on notice that the originals of these documents have been filed with your Court.

As always, I thank you and your staff for all the help and assistance you repeatedly provide with regard to these matters.

Sincerely,

Timothy J. Newton

TJN/hws
Enclosures
cc: E. Grey Wicker, Esq.,
Michael E. Spears, Esq.
Marcus K. McGarr, Esq.
Rosalyn Frierson, Ct. Admin.
Ron B. Diegel, Esq.



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