THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Appellate Case No. 2015-002417

In Re: The Estate of James Brown a/k/a James Joseph Brown

Tommie Rae Brown ..... Petitioner below,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deana Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown, Respondents below,

Of whom Deanna Brown-Thomas, Yamma Brown, and Venisha Brown
Are the ..... Appellants,

And

Of whom Tommie Rae Brown is the .....Respondent.

RESPONDENT'S MOTION TO DISMISS APPEAL

Pursuant to Rule 240, SCACR, Respondent Tommie Rae Brown moves to dismiss the consolidated interlocutory appeals of the Order of the Honorable Doyet A. Early, III

filed January 1, 2015, granting Respondent's Motion for Partial Summary Judgment and denying the Appellants' Motion for Summary Judgment, and the appeal of the Appellants of the Order filed October 26, 2015, denying the Appellants' Motion to Alter, Amend, or Reconsider.

The grounds for this motion are that the two interlocutory orders the Appellants are attempting to immediately appeal relate solely to the Respondent's standing to bring her Probate Court actions for elective share and omitted spouse, and an order denying a challenge to a plaintiff's standing to bring an action is not immediately appealable.

I. THE ORDER DENYING THE APPELLANTS' MOTION FOR SUMMARY JUDGMENT IS NOT APPEALABLE.

First, the law is well settled that an order *denying* a motion for summary judgment is not only not immediately appealable, it is not even reviewable after the trial of the case on the merits. *Silverman v. Campbell*, 326 S.C. 208. 486 S.E.2d 1 (1997). This rule holds true even when there is another appealable issue in the case. As carefully explained in great detail in *Hedgepath v. AT & T*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001), this Court lacks jurisdiction to review such orders:

> Nassau appeals the denial of its summary judgment motion.
>
> We must initially determine if this court has subject matter jurisdiction over Nassau's appeal.
>
> Nassau asserts this Court should find it has subject matter jurisdiction over this appeal because there is an appealable issue before the court, *i.e.*, the grant of summary judgment in the *Banyard* case.
>
> We are aware that generally, the denial of a motion for summary judgment is not immediately appealable. *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994). Our appellate courts, however, have recognized an exception to this rule. Specifically, the courts have made a

practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable.

Our examination of the case law regarding this exception begins with the Supreme Court's agreement to consider an appeal of whether a trial court erred in failing to require a party make its complaint more definite in *Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979). Additionally appealed to the Court for its review was an issue of whether the trial court erred in overruling the appellant's demurrer. Presented with the question of whether to address the denial of the motion for a more definite complaint, the *Briggs* Court pronounced: "While not normally appealable, [the] issue [concerning the motion for a more definite complaint] is before the Court due to the appealability of the first issue [regarding the demurrer]." *Id.* at 379 n. 1, 256 S.E.2d at 546 n.1 (citation omitted).

This Court has taken a concordant view concerning the propriety of reviewing interlocutory orders not ordinarily immediately appealable.

In *Garrett v. Snedigar*, 293 S.C. 176, 359 S.E.2d 283 (Ct. App.1987), partners in a real estate venture brought an action for fraud, breach of contract, and violations of the South Carolina Uniform Securities Act against the organizer, a construction company, and an investment advisor who was retained to market the partnership. The investment advisor was also sued for negligence. The Circuit Court granted the plaintiffs' motion for summary judgment, which concerned the issue of whether their interests in the partnership were securities. The trial court additionally granted the plaintiffs' motion to amend their cause of action for negligence and denied the investment advisor's summary judgment motion pertaining to this claim. On appeal, the investment advisor argued, inter alia, the trial court erred in acting on the plaintiffs' motion to amend without holding a hearing separate from his motion for summary judgment. In response, the Court stated:

> An interlocutory appeal of this issue ... is not normally allowed. *See Davis-McGee Mule Co. v. Marett*, 129 S.C. 36, 37, 123 S.E. 323, 323 (1924) ("No appeal can be made except from a final judgment."). An order denying summary judgment cannot be appealed, even after trial. *Holloman v. McAllister*, 289 S.C. 183, 345 S.E.2d 728 (1986). However, these issues are properly before us because the issue of whether the Circuit Court erred in granting the motion of the plaintiffs for partial summary judgment is appealable. *See Briggs v. Richardson*, 273 S.C. 376,

379, 256 S.E.2d 544, 546 (1979) ("While not normally appealable, this issue is before the Court due to the appealability of the first issue.").

Id. at 183 n. 2, 359 S.E.2d at 287 n. 2 (emphasis added).

Numerous reviews of denials of summary judgment motions have occurred since *Garrett. See Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct.App.1992), cited in 4 Am.Jur.2d *Appellate Review* § 170 (1995) (in a case where opposing motions for summary judgment resulted in the trial court granting one and denying the other, the Court of Appeals held the party whose motion was denied may have the denial reviewed on the appeal because the question of whether the trial court erred in granting the other motion was appealable); *Pruitt v. Bowers*, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct.App.1998) ("[Respondent/Appellant] argues the trial court erred in granting [Appellant/Respondent's] motion to amend her complaint. [Appellant/Respondent] responds that the order granting the motion is interlocutory and thus not appealable. We agree that under the precedent of *Briggs v. Richardson* ... and *Garrett v. Snedigar* ... [Respondent/Appellant's] appeal of the amendment order is interlocutory and generally not appealable, but may be considered by the court because it accompanies the appeal of the grant of [Respondent/Appellant's] motion for summary judgment."); *Tanner v. Florence City-County Bldg. Comm'n*, 333 S.C. 549, 553, 511 S.E.2d 369, 371 (Ct.App.1999) (This Court ruled: "[A]n order that is not directly appealable will be considered if there is an appealable issue before this court.").

In *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985), the Supreme Court held reviewing the denial of summary judgment was proper to resolve protracted litigation: "Because of the need for final resolution in this [13-year-old medical malpractice] case, we have allowed this direct appeal from the lower court's order denying appellant's motion for summary judgment." *Id.* at 243, 335 S.E.2d at 799 (citation omitted). The issue of whether the denial was proper was the only one on appeal.

The continued viability of *Garrett* is debatable given the recent decisions of *Silverman v. Campbell*, 326 S.C. 208, 486 S.E.2d 1 (1997) and *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994).

In *Ballenger*, the Court stated:

> This Court has repeatedly held that the denial of summary judgment is not directly appealable. Further, this Court has held

that the denial of summary judgment is not reviewable even in an appeal from final judgment.

Id. at 476-77, 443 S.E.2d at 380 (citations omitted).

In addition, the *Ballenger* Court noted that it is "unnecessary [for the trial judge] to make findings of fact and conclusions of law in denying motions for summary judgment." *Id.* at 478 n. 1, 443 S.E.2d at 380 n. 1 (citing Rule 52, SCRCP). Thus, there would be no basis on which an appellate court could make its review.

In *Silverman*, our Supreme Court refused to consider the appellants' claim that the trial court had erred in denying its motion for summary judgment, although it did consider another issue raised by appellants because it was immediately appealable. Thus, the presence of an immediately appealable issue in the order did not make the denial of summary judgment reviewable in that instance. *Id.* at 211, 486 S.E.2d at 2; *cf. Holloman v. McAllister*, 289 S.C. 183, 345 S.E.2d 728 (1986) (declining to address denial of summary judgment after trial while addressing other appealable issues); *Davis v. Tripp*, 338 S.C. 226, 525 S.E.2d 528 (Ct.App.1999) (stating denial of summary judgment was not reviewable either before or after final judgment).

Silverman may represent an attempt to curtail *Garrett* style exceptions, thereby requiring a closer inquiry into their continued viability.

Because of the dissonance in the precedent in regard to the appealability of the denial of a motion for summary judgment, we decline to address the issue on the merits.

Id. at 362, 559 S.E.2d at ___.

Accordingly, the Appellants' appeal of the denial of their Motion for Summary Judgment should be dismissed.

II. THE ORDER GRANTING THE RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT MERELY DETERMINES THAT RESPONDENT HAS STANDING TO PURSUE HER PROBATE COURT CLAIMS.

Quite obviously, the purpose of Respondent's actions filed in Probate Court and removed to Circuit Court was not to establish the validity of her marriage to Brown, nor does the Probate Court even have jurisdiction to hear declaratory judgment actions to determine the validity of marriages. The Family Court has jurisdiction over such actions. The Probate Court has jurisdiction over marriage issues *only as they relate to matters dealing with estate, trust, and guardianship and conservatorship actions. See* S.C. Code Ann. § 63-3-530(B): "Notwithstanding another provision of law, the family court and the probate court have concurrent jurisdiction to hear and determine matters relating to paternity, common-law marriage, and interpretation of marital agreements; *except that the concurrent jurisdiction of the probate court extends only to matters dealing with the estate, trust, and guardianship and conservatorship actions before the probate court.*" (Emphasis added.)

The issue of the validity of Respondent's marriage to Brown was injected into the case only in the context of standing when the Appellants challenged Respondent's standing to bring her claims for elective share and omitted spouse's share. The Order granting Respondent's motion for partial summary judgment on this preliminary issue merely determines that Respondent has standing to pursue her substantive Probate Court claims. Neither this Court nor the Supreme Court has ever held that an interlocutory order denying a challenge to a plaintiff's *standing* either "involves the merits" under S.C. Code Ann. § 14-3-330(1) or "affects a substantial right" under S.C. Code Ann. § 14-3-330(2).

North Carolina, which has an appellate jurisdiction structure similar to that of South Carolina, has specifically ruled that an order denying a motion to dismiss for lack of standing is not immediately appealable because it is tantamount to an order denying a motion to dismiss under Rule 12(b)(6). See *Richmond Cnty. Bd. of Educ. v. Cowell*, 739 S.E.2d 566, 568-69 (N.C. Ct. App 2013):

> "A motion to dismiss a party's claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure." *Pineville Forest Homeowners Ass'n v. Portrait Homes Const. Co.*, 175 N.C.App. 380, 383, 623 S.E.2d 620, 623 (2006) (quoting *Slaughter v. Swicegood*, 162 N.C.App. 457, 464, 591 S.E.2d 577, 582 (2004)). "A trial court's denial of a Rule 12(b)(6) motion to dismiss generally does not affect a substantial right." *Carl*, 192 N.C.App. at 550, 665 S.E.2d at 793. Here, defendants have failed to show how the trial court's denial of their motion to dismiss based upon lack of standing affects a substantial right. "If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party's appeal on jurisdictional grounds." *Hamilton*, 212 N.C.App. at 77, 711 S.E.2d at 189 (*citing Pasour v. Pierce*, 46 N.C.App. 636, 639, 265 S.E.2d 652, 653 (1980) (*citing Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 210, 240 S.E.2d 338, 344 (1978))). Accordingly, we must dismiss defendants' standing argument as interlocutory and not affecting a substantial right. *See Anderson v. Town of Andrews*, 127 N.C.App. 599, 601, 492 S.E.2d 385, 386 (1997); *Meherrin Indian Tribe v. Lewis*, 197 N.C.App. 380, 385, 677 S.E.2d 203, 207 (2009).

As noted above, the alternative way the Appellants could have challenged the Respondent's standing would have been by way of a Rule 12(b) motion, and it is well settled in South Carolina that no orders denying Rule 12(b) motions are immediately appealable. "The Court does not allow immediate appellate review of the denial of Rule 12(b) motions." Toal, *et al., Appellate Practice in South Carolina*, at 92 (2d ed. 2002).

It would create a tsunami of piecemeal appeals to allow immediate appeals of every order determining that a plaintiff has standing to pursue his claim. Clearly, under S.C. Code Ann. § 14-3-330(1), an order denying a standing challenge is an intermediate order that may be reviewed on appeal after, and only after, the final judgment is entered on all the issues in the case.

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Charleston, SC
January 12, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Case Nos. 2013-CP-02-02849, 2013-CP-02-02850

Appellate Case No. 2015-002417

Tommie Rae Brown.....Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000, Deana Brown Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown,

of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000, is the.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Respondent's Motion to Dismiss Appeal has been served on all counsel of record by depositing a copy of same in the United States Mail, postage prepaid on January 12, 2016, and addressed as follows:

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January 12, 2016

By Email and US Mail
The Honorable Jenny Abbott Kitchings
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Re: Estate of James Brown a/k/a James Joseph Brown
Tommie Rae Brown, Respondent v. David C. Sojourner, Jr., et al.
Appellate Case No. 2015-002417
Civil Action No.: 2013-CP-02-2849 and 2013-CP-02-2850

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Respondent Tommie Rae Brown's **Motion to Dismiss Appeal** and the accompanying **Proof of Service**. Please file the original and six copies and return a clocked copy of the Motion and Proof of Service in the enclosed prepaid envelope.

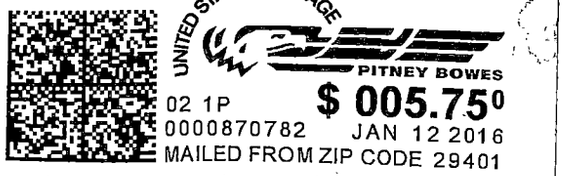
Thank you for your assistance, and please feel free to contact our office if you have any questions.

Sincerely,

Erin C. Casey

ECC
Enclosures
cc:
All Counsel of Record
Tommie Rae Brown

DAMAGED IN HANDLING IN THE POSTAL SERVICE



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