

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM KERSHAW COUNTY
In the Court of Common Pleas

SC Court of Appeals

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2013-CP-28-727

Marc A. QuigleyAppellant,

v.

Moore Beauston & Woodham, LLP..... Respondent.

RESPONSE TO MOTION TO DISMISS APPEAL

Florence, South Carolina

TURNER, PADGET, GRAHAM & LANEY, P. A.

February 5, 2016

J. René Josey, Esquire
Jeffrey L. Payne, Esquire
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ATTORNEYS FOR APPELLANT

Other Counsel of Record:

John James Duggan, Esquire
Duggan Law Firm, LLC
44 Markfield Avenue, Suite E
Charleston, SC 29407

ATTORNEYS FOR RESPONDENT

THIS APPEAL IS TIMELY

Respondent has filed a Motion to Dismiss this appeal – in part based upon the alleged untimeliness of the Notice of Appeal (points I and II of that Motion). As this Court is well aware, Rule 203(b)(1), applicable to appeals from the Court of Common Pleas, provides that a “notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.” In this case, the notice of appeal was mailed and served on January 15, 2016, and pursuant to SCACR 262(a)(2) is considered filed as of that date as well.

The notice of appeal itself represents that counsel for the Appellant received written notice of entry of the appealed order on December 16, 2015 which, if true, would render this appeal timely as filed and served on the last day provided by the Rules. In fact, however, counsel for the Appellant was out of the office and did not receive written entry of the appealed order until two days later on December 18, 2015. Because the actual delivery to the office occurred while counsel was away on Holiday leave and not logged by staff, Appellant’s counsel used two days after the December 14th cover letter to calculate the response time. This gave the United States Postal Service credit for a two-day delivery which did not occur. According to the Respondent’s certified mail receipt (described in Exhibit A attached), actual delivery was four days after their cover letter of December 14th; thus, the presumptive delivery date of December 16th used by Appellant’s counsel insured that the notice of appeal here was filed within 30 days.

In its motion, respondent represents, without any showing, that the Kershaw County Clerk’s office sent copies of the Order to all counsel of record – *and perhaps they did* – but this office never received any copy of the filed Order directly from the Clerk’s Office; this is known because, in fact, the only copy of the Order ever received by this office was the one sent with the December 14th cover letter of Respondent’s counsel. The mail log entry of Respondent’s counsel (Exhibit B to its Motion) suggests that the Order was received in that office on December 14th

with a notation made indicating “will forward to Payne” which was done by cover letter dated that same day although apparently not even placed in the mail system until the 16th (again, See Exhibit A to this Response). It is a common practice in many counties and circuits to have one counsel (particularly prevailing counsel) insure that all counsel receive a copy of the court’s order. It is the undersigned’s belief that this is what occurred in this case – even if Mr. Malloy (also associated with the prevailing party) received a copy directly from the clerk.

Respondent’s motion asks this Court to assume that a direct copy was mailed by the Clerk’s office and assume that it was received on or before the 15th of December. While perhaps not necessary, Appellant’s counsel has attached to this Response the affidavit of attorney Jeffrey L. Payne (Exhibit C) who handled the trial matters on behalf of Appellant. This affidavit verifies under oath the representations made herein that only one copy of the order was received and it was received by mail from Respondent’s counsel with the letter dated December 14th – a letter Respondent now confirms was delivered on December 18th while Mr. Payne was away from the office with his family. The actual delivery date of December 18, 2015 would allow a notice of appeal to be filed as late as January 18th since the 30th day would fall on a weekend. See SCACR 263(a). This notice was filed three days earlier and well within the time allowed.

**POLICY FAVORING ARBITRATION DOES NOT EXTEND SCOPE OF
ARBITRATION CLAUSES**

The third point (III) of Respondent’s Motion to Dismiss this Appeal suggests that dismissal is appropriate simply because public policy favors arbitration – where arbitration is applicable. This argument, of course, goes to the heart of the appeal itself as well as the Court’s *sua sponte* concerns with immediate appealability. As argued in the Appellant’s **Memorandum in Support of Immediate Appealability** – filed at the invitation of the Court and incorporated herein by reference -- Appellant contends that the arbitration provision does not reach all of the

pleaded claims (particularly the statutory wage payment claim) and that an immediate appeal is *not only appropriate* to avoid piecemeal litigation and to preserve “a substantial legal right” regarding the mode of adjudication chosen by Appellant, guaranteed by statute, *but required* to avoid a claim of waiver if not enforced by such immediate appeal.

While Appellant incorporates the arguments of that **Memorandum in Support of Immediate Appealability**, he will not overburden the Court’s file by repeating the full argument herein. Suffice it to say that the trial court failed to properly apply Zabinski v. Bright Acres Assoc., 346 S.C. 580, 553 S.E.2d 110 (2001), and other applicable law which actually support the immediate appeal and non-arbitrability of claims lacking a “significant relationship” to the arbitration clause – even claims between partners (such as found in Zabinski and the case at hand) where a broad arbitration clause is present (essentially identical in Zabinski and the case at hand¹). Just as the Zabinski claim between partners “concerning the purchase agreement entered into by [one partner] to buy [another partner’s] interest in the partnership” was “completely unrelated to the partnership agreement” and was “completely independent of any dispute arising out of the partnership agreement”, Id. at 598, 553 S.E.2d at 119 (“and are not arbitrable”), the statutory wage claim here is unrelated to the partnership agreement and independent of the partnership agreement. Moreover, the merits of this argument are immediately appealable as “a final order affecting a substantial right”, see S.C. Code § 14-3-330(3), and such orders regarding the mode of adjudication must be raised in the trial court at the first opportunity. Accord Foggie v. CSX Transp., Inc., 313 S.C. 98, 431 S.E.2d 587 (1993). Indeed, a bifurcation determination in Morrow v. Fundamental Long-Term Care Holdings, LLC,

¹ The arbitration provision in Zabinski stated that “any controversy or claim *arising out of the partnership agreement*” would be subject to arbitration (emphasis added). Similarly, Section 14-1 of the partnership agreement here provided that “a controversy or claim *arising out of this Agreement*...shall be settled by arbitration.” (Emphasis added).

412 S.C. 534, 773 S.E.2d 144 (2015) was found to affect a substantial right regarding the mode of adjudication.

CONCLUSION

This appeal is clearly timely. Vacationing counsel's conservative assumption of written notice received in his absence actually proved to allow him additional days to serve Appellant's Notice of Appeal. The scope of the arbitration clause here, even if favored in a general sense, does not expand to reach unrelated claims not dependent upon the partnership agreement itself. Appellant's wage claim is not one about partnership governance, ownership, or management. The Circuit Court's order affected the substantial right to a statutory "civil action" for unpaid wages which is appropriately finalized in an immediate appeal to avoid piecemeal litigation.

Florence, South Carolina

February 5, 2016

TURNER, PADGET, GRAHAM & LANEY, P. A.

By: 

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Jeffrey L. Payne, Esquire
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ATTORNEYS FOR APPELLANT

EXHIBIT A

Josey, J. Rene

From: Payne, Jeff L.
Sent: Thursday, February 04, 2016 2:03 PM
To: Josey, J. Rene
Subject: FW: Moore Beauston and Woodham v. Quigley

From: Christina Wynn [<mailto:wynn@dugganlawgroup.com>]

Sent: Thursday, February 04, 2016 2:01 PM

To: Payne, Jeff L.

Subject: Re: Moore Beauston and Woodham v. Quigley

Good afternoon Mr. Payne,

With regard to information from the Clerk's office, my office actually reached out to Judge Manning's Law Clerk and the Clerk of Court by phone and it was stated that the Order was sent out via mail to all counsel on December 10, 2015, and that they typically do not have a cover letter attached. We received the timestamped order from the Clerk of Court on December 14, 2015, as did Senator Malloy, and it simply seemed odd that you would have received the Order at a later time before you received it from our Office. We simply mailed the Order to you as a courtesy when we received it. We are inquiring as to when you received the Order and asking that you provide documentation as well as to when you received it so that we can be sure of the timeline and that filings were indeed timely.

We attached our pleadings log which indicates the date that we received the Order as an attachment to the Memo on the Motion to Dismiss as there was no cover letter from the Court stating the date it was mailed, which is their customary practice. It is our office's customary practice that all pleadings received are logged upon receipt. We did send you the Order by certified mail and by the return receipt you received it on December 18, 2015, which is why we question the date of December 16, 2015. We did put it in the mail to you on the 14th and sent the Proof of Delivery to the Court the next day. The tracking information does show that it did not enter the mail system until December 16, 2015 for whatever reason and that you received it on December 18, 2015 at 10:44 AM.

We would ask that you forward the proof of when you received the Order so that the proper timeline can be established.

Thank you,

Christina Demos Wynn

Duggan Law Firm

44 Markfield Drive, Suite E

Charleston, SC 29407

(843) 414-7732 (Direct Dial)

(843) 414-7730 (Office Staff)

(843) 414-7738 (Fax)

Email: wynn@DugganLawGroup.com

EXHIBIT B

PLEADINGS SIGN IN FOR HAND DELIVERED or MAILED DOCUMENTS

Date	Time	Case and Document	Person who signed for documents	Person Document was given to	On Calendar/ Date Due
12-8-15		[REDACTED]			
		[REDACTED] →	pm	CDW	
		[REDACTED] →	pm	CDW	
		[REDACTED]	pm	CDW	
12-14-15		Braunton + Woodham, L.L.P. v. Quigley Filed Order to Compel Arbitration	pm	CDW	will forward to Payne.
12-16-15		[REDACTED]	pm	CDW	30d to calendar on ROS'S.
12-28-15		[REDACTED]	JTP	CDW	received + filed.
12-28-15		[REDACTED]	JTP	JJP	?
1-7-16		[REDACTED]	pm	CDW	no resp needed
1-9-16		[REDACTED]	pm	CDW	no resp needed

EXHIBIT A

EXHIBIT C

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
In the Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2013-CP-28-727

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Marc A. QuigleyAppellant,

v.

Moore Beauston & Woodham, LLP..... Respondent.

AFFIDAVIT OF JEFFREY L. PAYNE

PERSONALLY APPEARED before me Jeffrey L. Payne who, being duly sworn,
deposes and says as follows:

1. I was counsel for the Appellant in the Circuit Court.
2. In 2015, I was out of the office on December 15, 16 and 18-21 on holiday trips with my family.
3. When I returned from these days away, I had mail waiting on me including a letter from Respondent's counsel dated December 14th which had enclosed the Circuit Court's Order filed December 10, 2015 which is the subject of the present appeal. This was my first and only written notice of the Court's Order – I have never received a copy directly from the Kershaw County Clerk of Court.

4. Because the date of receipt for this letter was not logged by anyone in my absence, after consulting with staff to try and determine the arrival date for this correspondence, I used an estimated delivery date of December 16th to calculate the time to file a Notice of Appeal. In my nearly 30 years of business experience, two day delivery by the United States Post Office is optimistic even within the same state or city. Notably (and typically), the present Motion to Dismiss was dated and apparently mailed by Respondent's counsel on January 29, 2016 and it was received in my office from the United States Postal Service on Thursday, February 4, 2016, six days later.

5. I have now learned from Respondent's counsel that the letter was actually delivered to my office two days later on December 18, 2015.



Jeffrey L. Payne

SWORN to before me this
5th day of February, 2016

Venelyn L. Bradley
Notary Public for South Carolina
My Commission Expires: 10/5/2019

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The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2013-CP-28-727

Marc A. QuigleyAppellant,

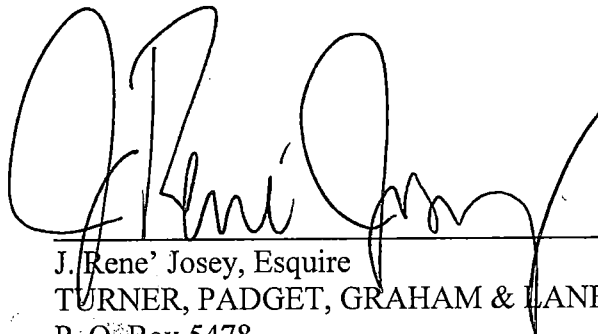
v.

Moore Beauston & Woodham, LLP Respondent.

CERTIFICATE OF SERVICE

I certify that I have served APPELLANT'S RESPONSE TO MOTION TO DISMISS APPEAL AND ACCOMPANYING EXHIBITS (INCLUDING AFFIDAVIT OF JEFFREY L. PAYNE) WITH THIS CERTIFICATE OF SERVICE by depositing one (1) copy of it in the United States Mail, postage prepaid, on February 5, 2016, addressed to:

John James Duggan, Esquire
Duggan Law Firm, LLC
44 Markfield Avenue, Suite E
Charleston, SC 29407



J. Rene' Josey, Esquire
TURNER, PADGET, GRAHAM & LANEY, P.A.
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Florence, SC 29502-5478
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(843) 667-0828 fax
Email: jjosey@turnerpadget.com

ATTORNEYS FOR APPELLANT

Turner | Padget

REPLY TO:

J. René Josey

E-Mail: RJosey@TurnerPadget.com
Writer's Direct Dial: (843) 656-4451
Writer's Direct Fax: (843) 413-5818

February 5, 2016

VIA HAND DELIVERY

Hon. Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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FEB 08 2016

SC Court of Appeals

Re: Marc A. Quigley v. Moore Beauston & Woodham, L.L.P.
Appellate Case Number: 2016-000094
Civil Action No.: 2013-CP-28-727
TPGL File No.: 12086.101

Dear Ms. Kitchings:

Enclosed please find the Appellant's **RESPONSE TO MOTION TO DISMISS APPEAL** (including exhibits). I have enclosed the unbound original and six copies of the Response (including exhibits) for the Court in accordance with SCACR 240(d). I've also enclosed an additional seventh copy of the Response (including exhibits) which I would appreciate your office stamping as filed and returning to us for completeness of our file. An original Certificate of Service is also enclosed with a single additional copy to be stamped and returned to us.

By copy of this letter to counsel for the Respondent, we are serving him with a copy of the enclosed Response (including exhibits) and Certificate of Service. Thank you for your attention to this matter.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.

J. René Josey

JRJ:vlb
Enclosures

Cc: Marc Quigley (w/enclosure)
John James Duggan, Esquire (w/enclosure)
Jeffrey L. Payne, Esquire (w/enclosure)