

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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Case No. 2012-CP-23-06209

**RECEIVED**

AUG 12 2016

SC Court of Appeals

Emil P. Kondra individually, and as  
Trustee of the Emil P. Kondra  
Revocable Trust, Emil P. Kondra,  
LLC, Emil P. Kondra Family Trust,  
Eileen Saxton and Douglass E.  
Kondra, as Trustees of the Emil P.  
Kondra Family Trust, Douglass E.  
Kondra, Helen Perry, and Lawrence F.  
D'Alessio,

Respondents

v.

Robert A. Nitsch and Veronica G.  
Nitsch, Individually and as Trustees of  
the Amended and Restate Veronica G.  
Nitsch Revocable Trust and the  
Amended and Restated Robert A.  
Nitsch Revocable Trust,

Respondents

Fensterstock & Partners LLP

Appellant.

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APPELLANT'S MEMORANDUM OF LAW AS TO ISSUE OF  
APPEALABILITY OF ORDER

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Blair C. Fensterstock  
Fensterstock & Partners LLP  
100 Broadway, 8th Floor  
New York, New York 10005  
Telephone: (212) 785-4100  
*Attorneys for Appellant*

Appellant Fensterstock & Partners LLP (“Appellant”) respectfully submits this Memorandum of Law in response to the August 3, 2016 request by the Clerk of this Court that Appellant serve and file a memorandum addressing the appealability of the June 21, 2016 Order of the Honorable Edward W. Miller dated June 21, 2016 (“Order”) to the extent that it denied Appellant’s Motion to Withdraw as Counsel for Defendants Robert A. Nitsch and Veronica G. Nitsch, Individually and as Trustees of the Amended and Restate Veronica G. Nitsch Revocable Trust and the Amended and Restated Robert A. Nitsch Revocable Trust (“Defendants”) in the underlying case.

### **PRELIMINARY STATEMENT**

Appellant respectfully submits that the Order denying Appellant’s Motion is immediately appealable under South Carolina Code Section 14-3-330(2)(a) as it substantially affects Appellant’s right to terminate its representation of Defendants in the underlying case; that Appellant is an aggrieved party entitled to an appeal under Rule 201(b) of the South Carolina Appellate Court Rules; and that the appeal is meritorious as the Order is contrary to Rule 1.16 of the South Carolina Rules of Professional Conduct. For these reasons, Appellant respectfully requests that this Honorable Court permit Appellant to proceed with its appeal of the Order.

### **FACTUAL BACKGROUND**

Appellant is a law firm that was retained by the Defendants to represent them in the underlying case.<sup>1</sup> On or about August 21, 2012, Defendants executed a retainer agreement in which they agreed to pay the usual and customary fees billed by Appellant, together with out-of-pocket costs and disbursements, and to provide a retainer.<sup>2</sup> As part of the retainer agreement,

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<sup>1</sup> March 29, 2016 Affidavit of Blair C. Fensterstock attached as Exhibit “A” to the Affidavit of Blair C. Fensterstock in Support of this Memorandum (“Fen. Aff.”), ¶ 6.

<sup>2</sup> *Id.* ¶¶ 6-7.

Defendants agreed that the Appellant has the right to withdraw from its representation of Defendants if their fees were unpaid for 60 days.<sup>3</sup>

On March 29, 2016, Appellant served and filed its Motion to Withdraw as Counsel for Defendants pursuant to Rule 11(b) of the South Carolina Rules of Civil Procedure (“Motion”) on the grounds that: “(1) the [Defendants] have failed to substantially fulfill an obligation to the [Appellant] regarding the [Appellant’s] services or payment after being given reasonable warning that the [Appellant] will withdraw unless the obligation was fulfilled; (2) there will be no prejudice to the [Defendants] should the Court grant the [Appellant’s] motion to withdraw; and (3) the [Appellant] has given the [Defendants] reasonable notice of the [Appellant’s] intent to withdraw.”<sup>4</sup> As set forth in the Affidavit of Blair C. Fensterstock in support of the Motion, Defendants failed to pay, and stated their intention not to pay, their outstanding bill to Appellant, which was more than 60 days overdue at the time the Motion was filed.<sup>5</sup> Mr. Fensterstock further stated that Appellant had provided clear notice to the Defendants concerning Appellant’s plans to withdraw, that Appellant had taken steps to avoid foreseeable prejudice to Defendants, and that Appellant received confirmation of receipt by Defendants of Appellant’s notice to withdraw.<sup>6</sup>

At the time Appellant served and filed its Motion, no discovery was pending in the underlying case, and Defendants had appealed the lower court’s December 21, 2015 order granting summary judgment to the Plaintiffs<sup>7</sup> as to the counterclaims asserted by the

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<sup>3</sup> *Id.* ¶ 8.

<sup>4</sup> March 29, 2016 Motion to Withdraw as Counsel attached as Exhibit “B” to Fen. Aff.

<sup>5</sup> Ex. “A” ¶¶ 10-11.

<sup>6</sup> *Id.* ¶¶ 16-17.

<sup>7</sup> Plaintiffs Emil P. Kondra, individually, and as Trustee of the Emil P. Konra Revocable Trust; Emil P. Kondra, LLC; Emil P. Kondra Family Tust; Eileen Saxton and Douglass E. Kondra, as Trustees of the Emil P. Kondra Family Trust; Dogulass E. Kondra; Helen Perry; and Lawrence D’Alessio (collectively, “Plaintiffs”).

Defendants.<sup>8</sup> Defendants retained attorney Jeffrey Dunlaevy of Stephenson & Murphy, LLC to handle Defendants' appeal of the lower court's December 21, 2015 order.<sup>9</sup>

On June 21, 2016, the lower court issued an Order denying Appellant's Motion stating that "[t]his Court will not allow counsel for the [Defendants] to withdraw until the [Defendants'] written consent is made part of the record, and until new counsel for the [Defendants] make an appearance."<sup>10</sup> On July 21, 2016, Appellant filed an appeal of the lower court's Order to this Honorable Court.<sup>11</sup> By letter dated August 3, 2016, the Clerk of this Court requested that Appellant "serve and file a memorandum addressing the issue appealability" of the Order challenged on appeal.<sup>12</sup>

## ARGUMENT

### **A. The Underlying Order Affects Appellant's Substantial Right to Terminate Its Representation and is Immediately Appealable.**

"The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by statute." *Hagood v. Sommerville*, 362 S.C. 191, 195 (2005) (citing S.C.Code Ann. § 14-3-330 (1976)). An order affects a substantial right and is immediately appealable under Section 14-3-330(2) when it "(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action." *Id.* "An order generally must fall into one of several categories set forth in [Section 14-3-330] in order to be immediately appealable." *Id.* "The reasons most often cited by state

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<sup>8</sup> Ex. "A" ¶¶ 14-15.

<sup>9</sup> *Id.* ¶ 15.

<sup>10</sup> June 21, 2016 Order attached as Exhibit "C" to Fen. Aff. at 11.

<sup>11</sup> July 21, 2016 Notice of Appeal attached as Exhibit "D" to Fen. Aff.

<sup>12</sup> August 3, 2016 Letter from the Clerk of this Court attached as Exhibit "E" to Fen. Aff.

courts which have concluded such an order may be immediately appealed include . . . the importance of the attorney-client relationship. . . .” *Id.* at 197.

The Order denying Appellant’s Motion is immediately appealable under Section 14-3-330(2)(a) as it affects a substantial right of the Appellant, namely, the right to terminate its representation of a client who does not “fulfill an obligation to the lawyer regarding the lawyer’s services or payment therefore” and whose “representation will result in an unreasonable financial burden on the lawyer” as set forth under Rule 1.16(b)(5) and Rule 1.16(b)(6) of the South Carolina Rules of Professional Conduct. This right falls within the scope of Section 14-3-330(2)(a) because the Order has the practical effect of rendering moot Appellant’s right to terminate its representation under the South Carolina Rules of Professional Conduct.

Furthermore, the Order will have a potential impact on both the attorney-client relationship and the overall litigation of the underlying case because Defendants’ repeated failure to make payments in accordance with their retainer agreement has made the ability of Appellant to render additional legal services unreasonably difficult. The Appellant has expended significant time, resources, and effort providing legal services to the Defendants, who have failed to pay their outstanding bill in accordance with their retainer agreement. Meanwhile, Defendants have retained another attorney to handle their appeal of a December 21, 2015 order by the lower court granting summary judgment to the Plaintiff, yet Appellant has not been paid for in excess of a year for the legal services it has already provided to Defendants. The continued representation of Defendants in the underlying matter will result in an unreasonable burden on the Appellant, as it is being compelled to expend additional time, resources, and effort without any compensation. Thus, the lower court’s ruling has caused, and will continue to cause, substantial financial loss for Appellant. To further compound the problem, the lower court is

also forcing Appellant to endure the loss of professional opportunities. Appellant will now have to incur the cost of litigation to recover the unpaid fees. Moreover, the practical effect of the lower court's ruling on Appellant is that Defendants will no longer have incentive to honor their retainer agreement with Appellant despite a clear obligation to do so, because Appellant is now forced to continue representing Defendants without compensation.

**B. Appellant is an Aggrieved Party Entitled to an Appeal.**

Rule 201(b) of the South Carolina Appellate Court Rules provides that “[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal.” “The word ‘aggrieved’ refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation.” *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 447 (Ct. App. 2008) (citing *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301 (Ct. App. 2001)). “A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest.” *Id.* The South Carolina Court of Appeals has recognized the right of an attorney to appeal an order where only the attorney is aggrieved and not his or her client. *See Burns v. Gardner*, 328 S.C. 608, 618 (Ct. App. 1997) (citing 4 C.J.S. *Appeal & Error* § 171 (1993) (“Where the attorney and not the client is aggrieved, the appeal must be taken by the attorney . . . An attorney may appeal from sanctions imposed upon the attorney, and the client may not do so.”)).

Here, the lower court's denial of the Appellant's Motion imposes a burden and obligation on the Appellant to represent Defendants without compensation. By denying Appellant's Motion, the lower court essentially rewrote the terms of the retainer agreement by permitting Defendants to fail to honor their payment obligations and by removing all consequences of doing

so. Therefore, Appellant is aggrieved by the denial of its Motion and is entitled to question this ruling on appeal.

**C. The Appeal is Meritorious as the Lower Court Committed Reversible Error.**

This Court should allow Appellant to proceed with its appeal because the lower court erroneously denied Appellant's Motion. The Appellant is entitled to withdraw as counsel for Defendants because of their categorical refusal to pay the Appellant for fees and expenses incurred in the course of presenting a defense and prosecuting counterclaims in the underlying case, which it has done, and continues to do, despite the fact that Defendants refuse to compensate Appellant for its services. The Appellant has demonstrated good cause for its withdrawal, provided adequate notice of its intention to withdraw as counsel, and has afforded Defendants ample opportunity to properly retain a law firm for its continued legal services – which they have done with respect to the separate appeal. As such, the lower court committed reversible error in denying Appellant's Motion.

An attorney may withdraw as counsel upon a showing of good cause by application to the trial court. S.C.R.Civ P. 11(b). The decision to grant or deny a motion to withdraw lies in the discretion of the trial court. *See Ex parte Strom*, 343 S.C. 257, 263, 539 S.E.2d 699, 702 (S.C. 2000). An attorney may be permitted to withdraw from representation where a client refuses to pay reasonable legal fees. *See Craig v. Law Office of Richard J. Breibart, LLC, Richard J. Breibart, and Rebecca West*, No. 2012-CP-32-03679, 2013 WL 10543435 (S.C.Com.Pl.) (Aug. 26, 2013). Therefore, the relief requested of the lower court was warranted based on Defendants' refusal to compensate Appellant for services rendered.

The lower court, in this case, denied Appellant's Motion stating that "[t]his Court will not allow counsel for the [Defendants] to withdraw until the [Defendants'] written consent is made

part of the record, and until new counsel for the [Defendants] makes an appearance.”<sup>13</sup> These conditions are without legal authority and are manifestly unreasonable. Neither the consent of the client nor the retaining of substitute counsel is required in order for an attorney to withdraw under the South Carolina Rules of Professional Conduct. The practical effect of the lower court’s ruling is that Defendants can now withhold their consent and refuse to retain substitute counsel while receiving the benefit of legal representation without having to compensate the Appellant. The lower court's Order is contrary to the South Carolina Rules of Professional Conduct and was improvidently entered.

**CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that this Honorable Court permit Appellant to proceed with its appeal of the Order.

Dated: August 11, 2016

FENSTERSTOCK & PARTNERS LLP

By: Blair C. Fensterstock  
Blair C. Fensterstock  
100 Broadway, 8th Floor  
New York, New York 10005  
Telephone: (212) 785-4100

*Attorneys for Appellant*

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<sup>13</sup> Ex. “C” at 11.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-06209

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Trustee of the Emil P. Kondra  
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LLC, Emil P. Kondra Family Trust,  
Eileen Saxton and Douglass E.  
Kondra, as Trustees of the Emil P.  
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Kondra, Helen Perry, and Lawrence F.  
D'Alessio,

Respondents

v.

Robert A. Nitsch and Veronica G.  
Nitsch, Individually and as Trustees of  
the Amended and Restate Veronica G.  
Nitsch Revocable Trust and the  
Amended and Restated Robert A.  
Nitsch Revocable Trust

Respondents

Fensterstock & Partners LLP

Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Memorandum of Law as to Issue of Appealability of Order and accompanying Affidavit of Blair C. Fensterstock in Support with Exhibits on Emil P. Kondra individually, and as Trustee of the Emil P. Kondra Revocable Trust, Emil P. Kondra, LLC, Emil P. Kondra Family Trust, Eileen Saxton and Douglass E. Kondra, as Trustees of the Emil P. Kondra Family Trust, Douglass E. Kondra, Helen Perry, and Lawrence F. D'Alessio, Robert A. Nitsch and Veronica G. Nitsch, Individually and as Trustees of the Amended and Restate Veronica G. Nitsch Revocable Trust and the Amended and Restated Robert A. Nitsch Revocable Trust by depositing a copy of it in the United States Mail, postage prepaid, on August 11, 2016, addressed to counsel of record and the Nitsch Respondents:

Samuel W. Outten  
Nelson Mullins Riley & Scarborough, LLP  
P.O. Box 10084  
Greenville, SC 29603-0084

Jeffrey P. Dunleavy  
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August 11, 2016

  
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*Attorneys for Appellant*

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August 11, 2016

**VIA FEDEX**

Ms. V. Claire Allen  
Deputy Clerk  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29211

**RECEIVED**  
AUG 12 2016  
SC Court of Appeals

Re: Ex parte: Fensterstock & Partners LLP  
Appellate Case No. 2016-001548

Dear Ms. Allen:

This Firm represents Appellant in the above-referenced matter. Pursuant to your August 3, 2016 letter requesting that Appellant serve and file a memorandum addressing the appealability of the order challenged on appeal, enclosed please find: (i) Appellant's Memorandum of Law as to Issue of Appealability of Order; (ii) Affidavit of Blair C. Fensterstock in Support with Exhibits; and (iii) Proof of Service.

Please do not hesitate to contact me if you have any questions or concerns.

Respectfully submitted,



Glen A. Kendall

Enclosures

cc: Mr. A.M. Quattlebaum, Jr. (via US Mail)  
Mr. Jeffrey P. Dunleavy (via US Mail)  
Ms. Stephanie Burton (via US Mail)  
Mr. Robert A. Nitsch (via US Mail)  
Mrs. Veronica G. Nitsch (via US Mail)

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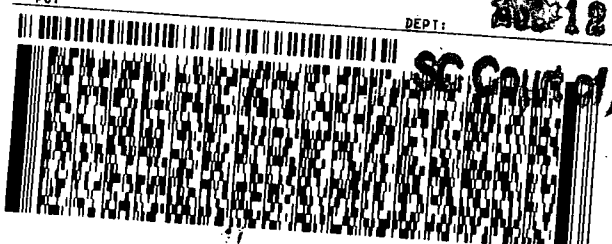
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