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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-06209
Appellate Case No. 2016-001584

RECEIVED
AUG 19 2016
SC Court of Appeals

John M. Campbell, Jr., Esquire,..... Respondent,

v.

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

**RESPONDENT'S MEMORANDUM OF LAW REGARDING THE
NON-APPEALABILITY OF THE DISCOVERY SANCTIONS ORDER**

NELSON MULLINS RILEY & SCARBOROUGH, LLP

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Attorney for Respondent

Pursuant to this Court's request dated August 9, 2016, Respondent respectfully submits this memorandum of law regarding the appealability (or lack thereof) of the discovery sanction order from which Appellants appeal. As explained below, a discovery sanction awarding attorneys' fees is not immediately appealable because it is not a final order or judgment nor does it fall within any of the categories of interlocutory orders which may be immediately appealed under S.C. Code Ann. § 14-3-330. Accordingly, this appeal should be dismissed.

FACTUAL BACKGROUND

This appeal arises from a dispute regarding the ownership of shares in Ellcon National, Inc. ("Ellcon"), a manufacturer of railroad car components headquartered in upstate South Carolina. In 2008, Ellcon merged with a subsidiary of Faiveley Transport USA, Inc., from which Ellcon's shareholders—including Emil and Douglass Kondra and Robert and Veronica Nitsch—received substantial consideration for the Ellcon shares they owned. Four years later, the Nitsches filed a demand for arbitration against Mr. Campbell, who had served as outside general counsel for Ellcon, alleging the Nitsches' shares were diluted by improper and concealed stock transactions in 1964 and 1985, and that Mr. Campbell assisted the Kondras in wrongdoing that resulted in their receipt of allegedly excessive proceeds.

In response to the Nitsches' arbitration demand, Mr. Campbell filed a declaratory judgment action in South Carolina state court requesting a declaration that, *inter alia*, there was no binding arbitration agreement between the parties, and that all funds from the merger were properly accounted for, properly distributed to, and received by the Ellcon stockholders. The Nitsches subsequently answered and asserted counterclaims involving the alleged misrepresentation or concealment of the number of shares actually owned by the Kondras. Mr.

Campbell moved to dismiss the counterclaims against him, and on October 25, 2013, the trial court dismissed four of the five counterclaims against him.

The parties attempted to engage in discovery but encountered disputes centering on privileged documents that had been removed from Emil Kondra's home office beginning in the early 2000s through 2008 by his wife and surreptitiously given to the Nitsches in black trash bags. On July 25, 2014, counsel for the Nitsches moved to have a Discovery Referee appointed. The trial court granted the motion with no objection and appointed Mason A. Goldsmith, Esquire, who was suggested by counsel for the Nitsches, as Discovery Referee. The Referee conducted a thorough analysis of the issues assigned to him, including reviewing multiple submissions and briefs by the parties and holding a hearing in his office on April 1, 2015.

On August 21, 2015, the Referee submitted his findings in a Report & Recommendation ("R&R") to the trial court. The R&R concluded that sanctions against the Nitsches were warranted in light of (1) Mrs. Nitsch's misconduct by receiving and attempting to use in litigation thousands of purloined documents that were clearly protected by the attorney-client privilege, and (2) the ethical breaches of the Nitsches' counsel in refusing to return the privileged documents and instead using them in the litigation.¹ Accordingly, the R&R recommended a sanction of awarding Mr. Campbell the attorneys' fees incurred for time spent in requesting return of the pilfered documents, preparing the motions filed regarding those documents, and engaging in proceedings before the Discovery Referee.

¹ The Referee also concluded the Nitsches counterclaims were barred by the applicable statutes of limitations.

The trial court adopted the R&R in an Order dated September 29, 2015. Mr. Campbell subsequently moved for summary judgment based on the untimeliness of the Nitsches' counterclaims, and the trial court granted the motion in an order dated December 23, 2015.²

Mr. Campbell subsequently filed a Petition for Attorneys' Fees and an Affidavit of Attorneys' Fees seeking an award of attorneys' fees in the amount of \$120,251.50 pursuant to the R&R and the trial court's order adopting the R&R. The trial court held a hearing on the Petition on March 31, 2016. Following the hearing, pursuant to the court's request, Mr. Campbell submitted the affidavit of William W. Wilkins confirming the good standing and reasonable rates of Mr. Campbell's attorneys, and also filed a memorandum responding the arguments made at the March 31 hearing by the Nitsches' counsel.

The trial court filed an order on June 21, 2016 finding the attorneys' fees requested by Mr. Campbell were reasonable, granting his Petition, and ordering the clerk to enter judgment against the Nitsches in the amount of \$120,251.50. This appeal followed.

ARGUMENT

A discovery sanction awarding attorneys' fees is not immediately appealable because it is not a final order or judgment nor is it one of the types of interlocutory orders from which an immediate appeal is authorized by statute. As a general matter, an appeal may be pursued only after final judgment. *See Long v. Sealed Air Corp.*, 391 S.C. 483, 491, 706 S.E.2d 34, 38 (Ct. App. 2011) (“[W]ith certain exceptions, an appeal lies only from a final judgment.”) (citation omitted). The sanction awarding attorneys' fees is not a final judgment because the underlying lawsuit is not yet completely concluded. “Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; *but if it so*

² An appeal from this order is currently pending before this Court. (Appeal No. 2016-000130.)

completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final.” *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 214, 152 S.E.2d 38, 48 (Ct. App. 2001) (quoting *Adickes v. Allison & Bratton*, 21 S.C. 245, 259 (1883)) (emphasis in original).

Instead of being a final judgment, the order challenged in this appeal is an interlocutory order. The ability to immediately appeal an interlocutory order is governed primarily by S.C. Code Ann. § 14-3-330, which permits the immediate appeal of the following types of orders:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions . . . ;
- (2) An order affecting a substantial right made in an action when such order (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;
- (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
- (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330. Discovery orders and sanctions typically do not fall within any of these categories and thus are not immediately appealable. *See Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) (dismissing appeal and noting that “discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right”); *Tucker v. Honda of S.C. Mfg., Inc.* 354 S.C. 574, 576, 582 S.E.2d 405, 406 (2003) (holding discovery order unappealable because it did not “involve the merits,” *i.e.*, it did not

“finally determine some substantial matter forming the whole or a part of some cause of action or defense.”) (quoting *Mid-State Distrib., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993)).

Accordingly, South Carolina’s courts do not permit an interlocutory appeal from a trial court order awarding monetary sanctions for discovery abuses,³ and the United States Supreme Court has held (under the analogous federal rule) that an order imposing attorneys’ fees as a sanction for discovery violations is not an immediately appealable order. *Cunningham v. Hamilton Cnty., Ohio*, 527 U.S. 198 (1999).

The instances in which discovery sanctions are immediately appealable are easily distinguished from the case at bar. For example, a discovery sanction dismissing a suit or striking part of a pleading is immediately appealable because it satisfies the requirements of § 14-3-330(2). See, e.g., *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 586 S.E.2d 572 (2003) (analyzing appeal of an order dismissing suit as a sanction for failure to cooperate in discovery); *Griffin Grading & Clearing, Inc. v. Tire Service Equipment Mfg. Co., Inc.* 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (analyzing appeal of trial court’s order striking defendant’s answer as a discovery sanction); *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C.

³ The sole instance in which our courts have considered such an appeal—*Enriquez v. S.C. Dept. of Corrections*, 374 S.C. 165, 648 S.E.2d 582 (2007)—contains no analysis of the immediate appealability of the discovery sanction awarding attorneys’ fees, and thus that opinion is not indicative of whether such orders are immediately appealable. See Toal *et al.*, *Appellate Practice in South Carolina* 142 (3rd ed. 2002) (“The appellate courts occasionally consider unappealable orders without discussing appealability, but such ‘silent’ considerations are not a ruling that the order is immediately appealable.”) (citations omitted).

In contrast, this Court has previously dismissed such an appeal in an unpublished opinion expressly stating that discovery sanction orders are not immediately appealable. Respondents mention this case without citation pursuant to Rule 268(d)(2), SCACR (“unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved”).

538, 489 S.E.2d 679 (Ct. App. 1997) (analyzing appeal of trial court's order striking pleadings and ordering default judgment as a discovery sanction).

Likewise, when a sanctions order is truly the final order that resolves the last disputed issue in a suit (*i.e.*, the merits of the substantive claims have previously been resolved), the sanctions order constitutes an appealable "final" order under § 14-3-330(1). *See, e.g., Culbertson v. Clemens*, 322 S.C. 20, 471 S.E.2d 163 (1996) (noting that although the order granting a divorce in mid-1994 normally "would constitute the final judgment, at that time the sanctions issue was still pending . . . [t]hus, the rights of the parties had not been completely determined until January 17, 1995, when the judge gave his final sanctions order").

Similarly, while an order finding a party in contempt for its actions in discovery is immediately appealable, *see Tucker*, 354 S.C. at 577, 354 S.E.2d at 406, there are "significant differences between a finding of contempt and a Rule 37(a) sanctions order," namely that the former is "designed to force the contemnor to comply with an order of the court," while the latter "lacks any prospective effect and is not designed to compel compliance." *Cunningham*, 527 U.S. at 208; *see also Tucker*, 354 S.C. at 577, 354 S.E.2d at 406 (holding discovery order was not immediately appealable in the absence of a finding of contempt); *Grosshuesch v. Cramer*, 377 S.C. 12, 659 S.E.2d 112 (2008) (analyzing appeal of contempt orders but declining to analyze discovery rulings involving request for sanctions, noting that such rulings are interlocutory and not immediately appealable); *Wilson v. Walker*, 340 S.C. 531, 539, 532 S.E.2d 19, 22 (Ct. App. 2000) (distinguishing between contempt and the discovery sanctions provided in Rule 37, SCRCP).

In the case at bar, the sanctions order awarding attorneys' fees fits into none of these categories. It is not a final judgment or order nor is it an immediately appealable interlocutory order under § 14-3-330, and this Court thus lacks jurisdiction over the appeal.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court dismiss this appeal because it arises from an interlocutory order that is not immediately appealable.

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Greenville, South Carolina
August 19, 2016

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Restated Robert A. Nitsch Revocable Trust, Appellants.

PROOF OF SERVICE

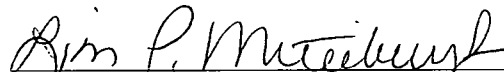
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Respondent's Memorandum of Law Regarding the Non-Appealability of the Discovery Sanctions Order

Counsel Served:

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Lisa P. Whitehurst
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August 19, 2016

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: John Campbell v. Robert Nitsch
Appellate Case No. 2016-001584

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Respondent's Memorandum of Law Regarding the Non-Appealability of the Discovery Sanctions Order in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy.

Very truly yours,

Samuel W. Outten
Samuel W. Outten

Matt Bog
w/permission

SWO:lpw
Enclosures
cc: Jeffrey P. Dunlaevy, Esquire