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-23-06211

John M. Campbell — Respondent

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

Stephanie H. Burton & Gibbes Burton, LLC — Appellants.

APPELLANTS' MEMORANDUM OF LAW AS TO ISSUE OF APPEALABILITY OF ORDER

PRELIMINARY STATEMENT

The Order denying Appellants' motion to withdraw is immediately appealable under S.C. Code § 14-3-330(3) as a final order implicating substantial rights of Appellants, namely the right to terminate representation and right to compensation for legal services. Likewise, it is appropriate for this Court to exercise appellate jurisdiction under the collateral order doctrine to avoid sanctioning an unreviewable order that is fundamentally unfair and burdensome to Appellants.

Appellants have standing to appeal as an aggrieved party. 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." A party is aggrieved by a judgment or decree "when it operates on his or her rights or property or bears on his or her interest." Powell ex rel Kelley v. Bank of Am., 379 S.C. 437, 447, 665 S.E.2d 237, 243 (Ct. App. 2008). Our courts have recognized an attorney's right to appeal an order where only the attorney is aggrieved and not his or her client. See Burns v. Gardner, 328 S.C. 608, 617-18, 493 S.E.2d 356, 361 (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....).

For these reasons, Appellants are entitled to appeal the trial court's order.

FACTUAL BACKGROUND

Appellants Stephanie H. Burton and Gibbes Burton, LLC were retained by Defendants, Robert A. Nitsch and Vernonica G. Nitsch to serve as local counsel in two related actions pending in the Court of Common Pleas in Greenville, South Carolina.[1] Throughout both cases, Blair Fensterstock and Fensterstock & Partners, LLP ("Fensterstock"), acted as lead counsel

[1] Affidavit of Stephanie H. Burton in Support of Motion to Withdraw at 1-2.

for Defendants.[2] Appellants acted as local counsel only and provided limited legal services in that capacity.[3] The underlying case concerns a dispute among shareholders of Ellcon-National, Inc. following a July 2008 merger. By order dated December 23, 2015, the Trial Court granted summary judgment against Defendants. The Trial Court subsequently denied Defendants' motion to reconsider. Defendants retained Jeffrey P. Dunleavey as appellate counsel and on January 26, 2016 Defendants filed notice of appeal from the Trial Court's December 23, 2015 order.

On April 1, 2016, Appellants filed and served a motion to withdraw as counsel for Defendants based upon Defendants' failure to make payment in accordance with their fee agreement and because representation of them had become unreasonably difficult.[4] Fensterstock likewise filed and served a motion to withdraw as counsel for Defendants on April 1, 2016 based upon Defendants' failure to pay for their legal services and expenses and breach of their retainer agreement.[5]

Without any hearing on the motions to withdraw, the Trial Court issued a consolidated order on July 21, 2016 on Plaintiffs' petition for attorney's fees and the motions to withdraw filed by Appellants and Fensterstock. The Court summarily denied both motions to withdraw stating that "[t]his Court will not allow counsel for the Nitsches to withdraw until the Nitsches' written consent is made part of the record, and until new counsel for the Nitsches make an appearance."[6] Needless to say, the Defendants never consented or responded to requests that they consent.

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[2] Id. at 2.
[3] Id. at 2.
[4] Affidavit of Stephanie H. Burton at 2.
[5] Affidavit of Blair Fensterstock at 3.
[6] Trial Court Order of June 21, 2016 at 11.

Through their appellate counsel, on July 20, 2016, Defendants filed a notice of appeal appealing the June 21, 2016 sanctions order of the Trial Court. These Appellants timely filed their notice of appeal from the Trial Court's denial of the motion to withdraw on July 21, 2016.

ARGUMENT

This Court may properly exercise jurisdiction in this matter for two reasons.

I. The Order Affects Substantial Rights and is Immediately Appealable under Section 14-3-330(2).

The Trial Court's order denying Appellants' motion to withdraw is a final order appealable under S.C. Code § 14-3-330(3). Ordinarily an appeal may be pursued only after a party has obtained a final judgment. Ex Parte Capital U-Drive It, Inc. v. Beaver, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330.[7] Specifically, S.C. Code Ann. § 14-3-330(3) requires appellate review of "[a] final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment."

The underlying action was resolved by grant of summary judgment on December 21, 2016. A grant of summary judgment is a final judgment. Accordingly, Appellants' motion to withdraw is a post-judgment application. Under S.C. Code Ann. § 14-3-330(3), appellate jurisdiction is mandatory if the order under appeal is "final" and "affects a substantial right." The order denying Appellants' motion to withdraw is both.

A. The Trial Court's Order is a Final Order.

An order is final "if it so completely fixes the rights of the parties that the court has nothing

[7] Review of an order within the scope of Section 14-3-3-330(1-4) is mandatory. S.C. Code Ann. 14-3-330 provides, in pertinent part: "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and **shall review upon appeal** (emphasis added): (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment."

further to do...." Ashenfelder v. City of Georgetown, 389 S.C. 568, 698 S.E.2d 856, 859 (Ct. App. 2010). In this case, the Trial Court issued an order requiring that Appellants continue their representation of Defendants unless they give written consent to withdrawal and obtain new counsel. In effect, the order is final and fixes the rights of all parties involved. Defendants presumably lack incentive to retain substitute counsel, because they have free legal counsel. See Fidelity Nat'l. Title Ins. Co. v. Intercounty Nat'l Ins. Co., 310 F.3d 537, 539 (7th Cir. 2002).[8] As the United States Court of Appeals for the Third Circuit has recognized, the appeal of an order denying permission to withdraw is a situation where "it is sometimes appropriate that the requirement of finality be given a practical rather than a technical construction .... [a]nd this is especially so when supplementary post-judgment orders are involved, because the policy against and the probability of avoidable piecemeal review are less likely to be decisive after judgment than before." Ohntrup v. Firearms Center, Inc., 802 F.2d 676, 678 (3rd Cir. 1986) (citing Plymouth Mut. Ins. Co. v. Illinois Mid-Continental Ins. Co., 378 F.2d 389 (3rd Cir. 1967). The same logic applies to the present case. The probability of subsequent 'piecemeal review' is minimal as the underlying case concluded with summary judgment.

Moreover, the Trial Court issued the order denying Appellants' motion to withdraw in conjunction with an order granting Plaintiffs' petition for attorney's fees. At the Trial Court's instruction, the Clerk of Court entered judgment in the amount of $120,251.50. Indubitably, this judgment is a final order. The issuance of this final order in conjunction with the order denying Appellants' permission to withdraw as counsel supports a conclusion that the order is final and

[8] In Fidelity, the U.S. Court of Appeals for the Seventh Circuit commented on a similar factual scenario where a district court denied counsel leave to withdraw unless the client obtained substitute counsel despite client owing $430,000 in fees and expenses. In this scenario, the court reasoned that "[s]ubstitution is unlikely, because the district court's order provides [client] with free legal assistance, while the[client] would have to give any replacement a hefty retainer." Id. at 539.

reviewable.

If the Trial Court's order is not a final order, it renders unreviewable the issue of whether counsel may withdraw. An order requiring a lawyer to work without compensation or under circumstances that make representation difficult or impossible is unrelated to the merits of the case and, therefore, cannot be rectified at the conclusion of the case. See Fidelity Nat'l. Title Ins. Co. v. Intercounty Nat'l Ins. Co., 310 F.3d 537, 539 (7th Cir. 2002) ("an incorrect decision forcing an unpaid lawyer to continue providing services never would supply a reason to reverse the final judgment."). This position is consistent with the view that "an appellate court has jurisdiction to review an order affecting a substantial right when the order has the effect of discontinuing the action or preventing an appealable judgment." Ashenfelder v. City of Georgetown, 389 S.C. 568, 569, 698 S.E.2d 856, 859 (Ct. App. 2010) (citing Lakes v. State, 333 S.C. 382, 384-85, 510 S.E.2d 228 (Ct. App. 1998)).

B. The Trial Court's Order Affects Substantial Rights.

The Trial Court's order requires Appellants to continue to represent Defendants unless they consent to withdrawal and obtain separate counsel. This order plainly affects substantial rights of Appellants — specifically, the right to compensation for legal services and the right to terminate representation of a client when representation is no longer feasible.

In all likelihood, Appellants' continued representation of Defendants will be uncompensated.[9] Requiring Appellants to continue representation without compensation or right to appeal is fundamentally unfair, exerts an unreasonable financial burden on Appellants, and would compel Appellants to expend additional time, resources and effort without compensation.

Furthermore, the Trial Court's order that Appellants continue representation without

[9] Affidavit of Blair Fensterstock at 3.

compensation implicates the Takings Clause of the Fifth Amendment of the United States Constitution. U.S. Const. amend. V ("[N]or shall private property be taken for public use without just compensation." In a separate context, the South Carolina Supreme Court recognized that a denial of compensation for legal services implicates the Takings Clause of the Fifth Amendment to the United States Constitution, because an "attorney's services constitute property entitling the attorney to just compensation." Ex Parte Brown v. Howard, 393 S.C. 214, 711 S.E.2d 899, 902 (2011).

The Trial Court's order denying Appellants' motion also implicates the Appellants' right to terminate representation of a client who "fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services or payment therefor" 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. Also, Rule 1.16(b)(6) allows the withdrawal where the representation "has been rendered unreasonably difficult by the client." Rules of Professional Conduct, Rule 1.16(b)(6). This right falls within the ambit of Section 14-3-330(3), because the order has the practical effect of rendering moot Appellants' right to terminate its representation under the South Carolina Rules of Professional Conduct.

In addition, Defendants recently filed a legal malpractice action against Appellants and Fensterstock.[10] Defendants' malpractice action creates a concurrent conflict of under Rule 1.7(a)(2) of the South Carolina Rules of Professional Conduct.[11] Due to the conflict, Appellants cannot continue their representation of Defendants, since Appellants' personal interests are

[10] C.A. No. 2016-CP-23-04705.

[11] Rule 1.7(a) provides in pertinent part: "A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or **by the personal interest of the lawyer.** (emphasis added).

apparently adverse to Defendants' interest. See Rules of Professional Conduct, Rule 1.7, Comment 4 ("If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation....). In light of this new development, the Trial Court's order affects a substantial right of Appellants, insofar as the Trial Court's order would force Appellants to represent Defendants while being sued by them at the same time.

II. Federal and Out-of-State Precedent Allow Appellate Jurisdiction Under the Collateral Order Doctrine.

No reported South Carolina appellate decision concerns the appealability of a trial court's order denying an attorney's motion to withdraw in a civil action. Therefore, it is appropriate to look to other federal and state appellate courts that have decided the issue. Review of out-of-state and federal decisions show that "nearly all of the courts which have decided this issue, federal and state, have held that orders denying an attorney's request to withdraw fall within the collateral order doctrine." In re: Frank, 207 Md. App. 679, 685-86, 55 A.3d 713, 717, (Md. App. 2012). Notably, every federal circuit to review the issue has determined that appellate jurisdiction is appropriate. Sanford v. Maid-Rite, 816 F.3d 546, 549 (8th Cir. 2016) ("[E]very circuit to consider the issue has concluded that the denial of a motion to withdraw is an appropriate basis for an interlocutory appeal."). The United States Courts of Appeals for the First, Second, Third, Sixth, Seventh and Eighth Circuits have each held that an order denying a motion to withdraw may be the subject of an interlocutory appeal. e.g., Rivera-Domenech v. Calvesbert Law Offices PSC, 402 F.3d 246, 249 (1st Cir. 2005) (per curiam) (observing that "at time of the entry of the denial of the motion to withdraw, there was interlocutory jurisdiction to take an appeal to this court."); Whiting v. Lacara, 187 F.3d 317 (2nd Cir. 1999) (finding court has appellate jurisdiction over a denial of counsel's motion to withdraw under the collateral order doctrine); Ohntrup v. Firearms Center, Inc., 802 F.2d 676 (3rd Cir. 1986) (finding order denying counsel's motion to withdraw – made

following entry to judgment – is appealable because counsel would otherwise be denied meaningful review of the order.); Brandon v. Blech, 560 F.3d 536, 537-39 (6th Cir. 2009) (holding that denial of motion to withdraw is an appealable order under the collateral order doctrine); Fidelity Nat'l. Title Ins. Co. v. Intercounty Nat'l Ins. Co., 310 F.3d 537 (7th Cir. 2002); Sanford v. Maid-Rite Corp., 816 F.3d 546 (8th Cir. 2016).

Moreover, many state courts have ruled that orders denying the withdrawal of counsel are immediately appealable. See, e.g., Galloway v. Clay, 861 A.2d 30, 31 (D.C. 2004) (holding that an order denying an attorney's request to withdraw satisfies the collateral order doctrine); Silva v. Perkins Mach. Co., 622 A.2d 443, 444 (R.I. 1993) (per curiam) (holding "that the order denying [attorney's] motion to withdraw possesses the requisite degree of finality" and that it should be reviewed immediately to avoid imminent hardship to the attorney); Jacobs v. Pendel, 98 N.J. Super. 252, 236 A.2d 888 (N.J. Super. Ct. App. Div. 1967) (leave granted for interlocutory appeal of order denying motion to withdraw as attorneys); Smith v. Smith, 779 N.E.2d 6, 7-8 (Ind. App. 2004) (court certified interlocutory appeal of order denying motion to withdraw); Kingdom v. Jackson, 78 Wn.App. 154, 156, 896 P.2d 101, 103 (Wash. App. Div. 2 1995) (appellate court granted review of order denying withdrawal of counsel).

The most common approach for interlocutory appeal of an order denying withdrawal is the collateral order doctrine, a "narrow exception to the general rule that interlocutory orders are not appealable as a matter of right." Whiting v. Lacara, 187 F.3d 317, 319 (2nd Cir. 1999). The collateral order doctrine is "limited to trial court orders affecting rights that will be irretrievably lost in the absence of immediate appeal." id. (citing Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430-31 (1985). To fit within the collateral order exception, the interlocutory order must: (i) conclusively determine the disputed question, (ii) resolve an important issue completely separate

from the merits of the action, and (iii) be effectively unreviewable on appeal from a final judgment. Whiting v. Lacara, 187 F.3d 317, 320 (2nd Cir. 1999) (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

The denial of Appellants' motion to withdraw satisfies each requirement of the collateral order exception. First, the order denying Appellants' motion to withdraw conclusively determines the disputed issue – e.g. whether counsel will continue the representation or withdraw. Second, the issue of whether Appellants will continue to represent Defendants is completely separate from the merits of the action. Third, if review is not granted at this juncture, the Trial Court's denial of Appellants' motion will be completely unreviewable. If Appellants are compelled to continue the representation, the harm will be complete, no relief will be obtainable on appeal, nor is it likely that an appeal would be granted on the issue. Fidelity Nat'l. Title Ins. Co. v. Intercounty Nat'l Ins. Co., 310 F.3d 537, 539 (7th Cir. 2002) ("an incorrect decision forcing an unpaid lawyer to continue providing services never would supply a reason to reverse the final judgment.").

No South Carolina appellate court has ruled on the applicability of the collateral order doctrine related to an order refusing counsel permission to withdraw. However, in Ex Parte Capital U-Drive-It, Inc. v. Beaver, the South Carolina Supreme Court indicated that the federal collateral order doctrine is not applied in our state courts, but stated that: "we believe the reasoning of these cases [collateral order doctrine] is sound. 369 S.C. 1, 15 n.2, 630 S.E.2d 464, 472 n.2 (2006).[12] By not allowing review of an order denying withdrawal of counsel, South Carolina would be 'out-of-step' with courts throughout the nation that allow immediate appeal from denial of a motion to withdraw.

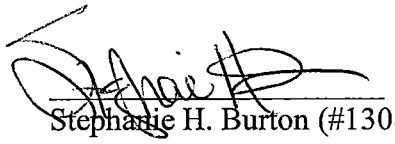
[12] In fact, no other reported South Carolina appellate case addresses whether our courts recognize the collateral order exception.

CONCLUSION

For the foregoing reasons, Appellants respectfully request permission to proceed with their appeal.

Respectfully submitted,

GIBBES BURTON, LLC



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August 15, 2016

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-23-06211

John M. Campbell, Esq. — 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

Stephanie H. Burton and Gibbes Burton, LLC — Appellants.

PROOF OF SERVICE

I certify that I served the Appellants' Memorandum of Law as to the Issue of Appealability of Order and Affidavit of Stephanie H. Burton by depositing copies of them in the U.S. Mail addressed to the Nitsch Respondents and counsel, as follows:

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August 15, 2016

s/Stephanie H. Burton
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August 15, 2016

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Emil P. Kondra, et al. v. Robert A. Nitsch and Veronica G. Nitsch, et al.
C. A. No.: 2012-CP-23-06209
Appellate Case No. 2016-001547

Dear Ms. Kitchings:

As requested in your letter of August 3, 2016, we enclose for filing an original and two copies of the following:

1. Appellants' Memorandum of Law as to Issue of Appealability of Order;

2. Affidavit of Stephanie H. Burton; and

3. Our Proof of Service.

We would appreciate you filing these papers and returning two clocked copies to us in the enclosed envelope.

With kind regards,

Yours very truly,

GIBBES BURTON, LLC

Stephanie H. Burton

SHB/ahl
Enclosures
cc: Mr. A.M. Quattlebaum, Jr. (w/enclosures)(by US Mail)
Mr. Jeffrey P. Dunlaevy (w/enclosures)(by US Mail)
Mr. Blair C. Fensterstock (w/enclosures)(by US Mail)
Mr. Ronald L. Richter, Jr. (w/enclosures)(by US Mail)
Mr. Robert A. Nitsch (w/enclosures)(by US Mail)
Mrs. Veronica G. Nitsch (w/enclosures)(by US Mail)

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August 15, 2016

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: John M. Campbell, Esq., et al. v. Robert A. Nitsch and Veronica G. Nitsch, et al.
C. A. No.: 2012-CP-23-06211
Appellate Case No. 2016-001546

Dear Ms. Kitchings:

As requested in your letter of August 3, 2016, we enclose for filing an original and two copies of the following:

1. Appellants' Memorandum of Law as to Issue of Appealability of Order;

2. Affidavit of Stephanie H. Burton; and

3. Our Proof of Service.

We would appreciate you filing these papers and returning two clocked copies to us in the enclosed envelope.

With kind regards,

Yours very truly,

GIBBES BURTON, LLC

Stephanie H. Burton

SHB/ahl
Enclosures
cc: Mr. Samuel W. Outten (w/enclosures)(by US Mail)
Mr. Jeffrey P. Dunlaevy (w/enclosures)(by US Mail)
Mr. Blair C. Fensterstock (w/enclosures)(by US Mail)
Mr. Ronald L Richter, Jr. (w/enclosures)(by US Mail)
Mr. Robert A. Nitsch (w/enclosures)(by US Mail)
Mrs. Veronica G. Nitsch (w/enclosures)(by US Mail)

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RECEIVED
AUG 18 2016
SC Court of Appeals

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