

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Lawton McIntosh, Circuit Court Judge

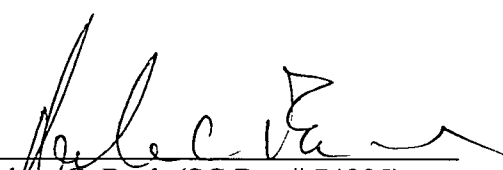
~~Opinion No. 2016-000662 (S.C. Ct. App. filed Aug. 22, 2016)~~

Mattress by Appointment, LLC, a Florida limited liability company f/k/a Carolina
Bedding Direct, LLC, a Florida limited liability company.....Petitioner,

v.

Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren
Conrad.....Respondents.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


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REPLY TO STATEMENT OF THE CASE

The Respondents statement of the case centers on a default judgment that Retail Service Systems, Inc. (“RSS”) obtained against two entities that it concedes are not the petitioner Mattress by Appointment, LLC (“MBA”). Respondents must so concede because their attempt to treat the entities against which they obtained a judgment in Ohio as MBA was specifically rejected by the Ohio court. Respondents filed suit against two defunct entities in Ohio.¹ These entities went into default. When they tried to then claim that these entities were predecessors of MBA and, therefore, MBA was also in default, the Ohio court rejected their claim. See Report and Recommendation of Mark Abel, Magistrate Judge, affirmed Retail Service Systems, Inc. v. Carolina Bedding Direct, LLC, et. al., 2:13-994-GCS, Docket Entry 102, August 27, 2014 (S. D. Ohio). As stated by the Ohio court:

Equally misguided, however, are RSS’s attempts to assert that there are three named defendants rather than two. Carolina Bedding, LLC (FL), quite simply, is not a party to this action. Despite RSS’s assertion that Carolina Bedding Direct of Florida, LLC and/or Mattress By Appointment, LLC are successor limited liability companies of Carolina Bedding Direct of North Carolina, LLC, and a judgment against Carolina Bedding Direct of North Carolina, LLC would be good against them, the complaint makes no such allegations. If RSS intended to bring this action against Carolina Bedding, LLC (FL) in addition to CBD Dissolved, the case caption should have clearly identified Carolina Bedding, LLC (FL) as a defendant.

See Appendix at 49-58. Respondents continue to pretend that a determination has been made by the Ohio court that MBA is using its trade secrets. This is false. No court has ever determined that MBA is using any trade secret owned by Respondents.

¹ Both of these entities were created by RSS and Andrew’s employee, Darren Conrad.

This case has nothing to do with Respondents' trade secrets. Instead, it concerns Respondents' knowing violation of MBA's contractual rights. Unlike Respondents and their unproven allegations about trade secrets, MBA has orders from a sister court, the Circuit Court for Duval County, Florida, holding that MBA has a valid non-compete agreement with Darren Conrad and with its dealers. See Appendix at 80-94; 96-100. Despite knowledge of these contracts and the Florida court's injunctions, RSS and Andrew have chosen to hire Conrad specifically to solicit MBA's dealers to violate their agreements with MBA. See Appendix at 101-114.

RSS and Andrew have never denied that they hired Conrad to compete against MBA, an action in violation of the Florida court's order. In fact, the Florida court became so frustrated by Conrad's contempt for its injunction that it struck Conrad's pleadings and ordered him to serve sixty (60) days in prison. Appendix at 96-100. In a second order entered three months after the order contained in the Appendix, the Florida court specifically mentioned Conrad's work with BoxDrop, RSS, and Andrew as further reason to sanction Conrad.

MBA has filed suit in South Carolina because Respondents have repeatedly shown that they do not care about MBA's contracts, the Florida court's orders, its injunctions, or its sanctions against Conrad. Unlike Respondents, who treat their unproven allegations as if they were facts, MBA has received judicial determinations finding that it has valid contracts and that these contracts are being interfered with by RSS and Andrew's employee Conrad. This interference is not accidental; it is precisely why RSS and Andrew hired Conrad.

Additionally, lost within Respondents' statement of the case is a statement of why any of their allegations matter to the South Carolina action. Respondents seem to be taking the position that if they can somehow translate their default judgment against two non-related entities into a

judgment against MBA, then that gives them the right to trample MBA's contractual rights and ignore orders from sister courts. This is incorrect.

Regardless, MBA seeks nothing more by this appeal than the ability to pursue its case with full, zealous representation from its attorneys consistent with the Rules of Civil Procedure and the Rules of Professional Conduct. The challenged order denies it that opportunity and should be reversed.

ARGUMENT

I. The Notice of Appeal was Timely Served

Respondents argue that the Notice of Appeal was not timely served because MBA filed a motion to amend before filing a notice of appeal and the motion to amend did not stay the time for appeal. This is incorrect. First, there is no South Carolina authority supporting RSS and Andrew's argument that a party cannot file a motion to reconsider, alter or amend an interlocutory order. Instead, as stated by the South Carolina Supreme Court, "[t]he trial court interlocutory orders are amendable." Johnston v. Bowen, 313 S.C. 61, 63, 437 S.E.2d 45, 47 (1993). In Johnston, Bowen filed a motion for summary judgment based on the statute of limitations. Id. The trial court denied the motion. Id. Bowen filed a motion to reconsider and the trial court amended the order to state that the motion was denied pending discovery, then later granted the motion. Id. Johnston appealed, arguing that the trial court "erred in amending the first order denying a motion for summary judgment in response to Bowen's motion to reconsider." Id. The Supreme Court summarily dispensed with this argument, "find[ing] no error" because "interlocutory orders" are amendable. Id.

Denials of motions for summary judgment are unquestionably interlocutory, see id.; U.S. Fidelity & Guaranty Co. v. City of Spartanburg, 267, S.C. 210, 211, 227 S.E.2d 188, 189 (1976) ("an order denying a motion for summary judgment is an interlocutory decision and not directly

appealable.”), and the Supreme Court decision’s in Johnston forecloses RSS and Andrew’s argument. Indeed, South Carolina authority has many examples of the Court of Appeals and Supreme Court considering appeals from the denial of motions to reconsider, alter, or amend interlocutory orders. See e.g., Watson v. Underwood, 407 S.C. 443, 457, 756 S.E.2d 155, 162 (Ct. App. 2014) (the issues raised in the [denied motion for summary judgment] motion may be raised again later in the proceedings by a motion to reconsider”); Pocisk v. Sea Coast Const. of Beaufort, 380 S.C. 584, 587, 671 S.E.2d 98, 100 (Ct. App. 2008) (appeal from denial of a motion to reconsider an interlocutory order); Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) (“This is an appeal from an order denying Joy Logan’s motions to reconsider” denial of her motion to amend her answer).

This is consistent with South Carolina’s long held view that “it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court ‘alter or amend the judgment,’ but also as a vehicle to seek ‘reconsideration’ of issues and arguments.” Elam v. S. Carolina Dep’t of Transp., 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). The “wisdom of giving [trial courts] the opportunity to promptly correct their own alleged errors is all the justification needed for the practice of freely allowing a motion for reconsideration.” Id. (quoting Blair v. Equifax Check Svcs, Inc., 181 F.3d 832, 837 (7th Cir. 1999)). Furthermore, “there is nothing inherently unfair in allowing a party one final chance not only to call the court’s attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.” Id. at 779.

Additionally, South Carolina does not recognize the “plain error rule” and, therefore, an appellate court cannot “consider and rectify an error not raised by the party below.” Elam, 602 S.E.2d at 780. Because South Carolina does not have the “plain error rule”, it is “doubly important

that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely.” Elam, 602 S.E.2d at 780. “A great number of reported cases in South Carolina for at least four generations...have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.” Id. at 779-780 (citing to Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”); Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); Gaffney v. Peeler, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal)).

Given this, it is important to clearly enunciate the implication of RSS and Andrew’s argument. The challenged Circuit Court order was issued *sua sponte* and not in response to any party’s motion. See Black’s Law Dictionary, 7th Ed. (*Sua Sponte*: Without prompting or suggestion; on its own motion). Because it was issued *sua sponte*, no party addressed, or had the opportunity to address, the order’s challenged requirements prior to the order’s issuance. If MBA cannot seek reconsideration of the Court’s *sua sponte* order, and if it cannot raise an issue on appeal that was not addressed by the trial court, there is no way to challenge the Court’s *sua sponte* order. Said differently, if RSS and Andrew are correct and MBA appealed before obtaining a ruling on its motion to reconsider, there would have been nothing for the appellate court to review because South Carolina does not adhere to the “plain error rule” and MBA’s exceptions and arguments had not yet been ruled upon by the trial court. Wilke, 497 S.E.2d at 733 (“It is axiomatic that an issue

cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”). Certainly it is not possible that some orders of the Circuit Court are beyond the reach of appellate review.

This result is impossible in light of S.C. Code § 14-3-330’s requirement of immediate appeal of certain interlocutory orders. See e.g., Hagood v. Sommerville, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) (“an order granting a motion to disqualify a party’s preferred attorney must be immediately appealed or any later objection in a subsequent appeal will be waived.”). If RSS and Andrew are correct, other *sua sponte* orders of a Circuit Court that fall within the ambit of S.C. Code § 14-3-330 cannot be reviewed by the appellate court. If a *sua sponte* order that, for example, issued an injunction, changed the mode of trial, or changed the identity of a defendant – all orders that are interlocutory and must be immediately appealed – cannot be the subject of a motion to reconsider, then because no exception or issue was raised or ruled upon by the appealing party with respect to the order, these orders cannot be reviewed by the appellate courts.²

Additionally, RSS and Andrew cite to federal authority in support of their position that a party cannot ask a trial court to reconsider an interlocutory order. Leaving aside whether this is correct, see contra Am. Canoe Ass’n v. Murphy Farms, Inc., 326 F.3d 505, 514 (4th Cir. 2003) (“Motions for reconsideration of interlocutory orders are not subject to the strict standards applicable to motions for reconsideration of a final judgment.”), federal courts, unlike South Carolina, follow the “plain error rule.” Tech Sys., Inc. v. Pyles, 630 F. App’x 184, 187 (4th Cir. 2015). A “plain error” is one that affects a litigant’s “substantial rights.” Id. Therefore, if this

² If RSS and Andrew reply that a motion to reconsider one of these interlocutory orders can be filed but does not stay the time for filing a notice of appeal, then appellate review of a *sua sponte* order is dependent on the Circuit Court ruling on the motion to reconsider within 30 days of its original order. Such a rule would give the Circuit Court control over whether its own orders are subject to appellate review.

case were in federal court, no motion to reconsider would be necessary because MBA could appeal the decision under the plain error rule, an avenue unavailable to it in South Carolina court.

Finally, even if RSS and Andrew are correct and the motion to reconsider was improper, no South Carolina court has held that an improper Rule 59 motion impacts the deadlines for appeal as set out in Rule 203, SCACR. The Supreme Court in Elam made clear that only a successive Rule 59 motion may not stay the deadline to notice the appeal. 602 S.E.2d at 777. As stated by the Supreme Court, “civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party.” Id. at 780. “If a party is unsure whether he properly raised all issues and obtained a ruling, *he must* file a Rule 59(e) motion... without concern a later appeal will be deemed untimely.” Id. (emphasis added).

Therefore, MBA had no choice but to file a motion to reconsider to make sure “all issues and arguments” were presented to and ruled upon by Circuit Court prior to filing this appeal. Elam, 602 S.E.2d at 780. MBA had no control over the amount of time needed by the Circuit Court to consider and rule on its motion to reconsider. This appeal was filed 24 days after counsel for MBA received the Circuit Court’s order denying its motion to reconsider. The appeal is timely.

II. The Appellants Could Not Wait for Dismissal to File an Appeal

Respondents argue that because MBA’s case has not yet been dismissed, the appeal is not ripe. As an initial matter, Respondents’ argument assumes the trial court will not strike the motions or pleadings based on lack of verification; this is pure assumption based, presumably, on the fact that the trial court had not so acted as of the date of the appeal, which stayed the underlying case. But the trial court has given no indication whether the commanded pleading or verifications are acceptable.

Regardless, Respondents’ argument is incorrect for two reasons. First, this Court has previously held that failure to immediately appeal an order affecting a substantial right will act as

a waiver of a subsequent appeal. See Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707, 710 (2005); Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 533 S.E.2d 331, 333 (2000). Because the order affects a substantial right, MBA could not wait to see if the trial court strikes its motion or pleadings without waiving the appeal.

Second, the right to appeal an order affecting a substantial right is granted by statute. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006) (“The right of appeal arises from and is controlled by statutory law.”); Baldwin Const. Co. v. Graham, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004) (“Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code Ann. § 14-3-330.”). MBA was not required to wait until dismissal or contempt because the right to appeal was statutory. In other cases affecting a substantial right, waiting until the party was actually aggrieved by the order – for example proceeding with an ordered mode of trial or without disqualified counsel – would waive later objection or appeal. Hagood, 607 S.E.2d at 710.

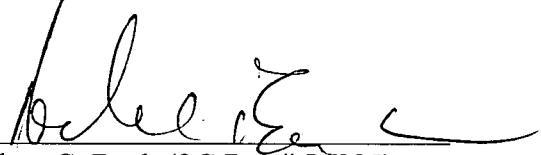
Faced with the Circuit Court’s order, MBA first sought to have the Circuit Court address all issues raised by the order through a motion to amend or reconsider, as parties have been commanded to do for “at least four generations.” Elam, 602 S.E.2d at 799-780. Once that motion was denied, MBA either had to immediately appeal that order or face the possibility that later objection or appeal was waived. Hagood, 607 S.E.2d at 710.

CONCLUSION

For the reasons stated above and in its petition, Petitioner asks the Court to grant the petition for a writ of certiorari.

November 1, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Adam C. Bach', written over a horizontal line.

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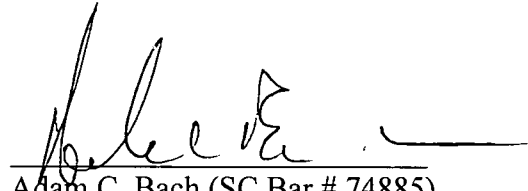
PROOF OF SERVICE

I certify that I have filed the Petition for Writ of Certiorari and Appendix and served these documents on the Respondents Retail Service System, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad by depositing a copy of same in the United States Mail, postage prepaid, on November 1, 2016, addressed to the Clerk of the Supreme Court, the Clerk of the Court of Appeals, and to Respondents' attorneys of records as follows:

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