

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

9th Judicial Circuit Court Judge

S.C. Court of Appeals filed June 26, 2017.

COA App. Case No. 2017-000266

RECEIVED

AUG 21 2017

SC Court of Appeals

C. Holmes, M.D.,

Appellant/Petitioner,

v.

James Y. Becker, Manton Grier, and
Haynsworth Sinkler Boyd, P.A.,
as successor to Sinkler & Boyd, P.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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IV. The order is appealable under S.C. Code Section 14-3-330(4).

V. Pursuant to Rule 205, SCACR, the appellate court obtains exclusive jurisdiction upon the timely service of the notice of appeal.

VI. The money judgment exception to automatic stay does not apply because the matter herein does not constitute a “money judgment” in the underlying claim within the contemplation of S.C. Code Section 18-9-130; rather the matter is incidental to the underlying claim.

VII. The lower court’s reliance on the December 2009 order is a violation of State and federal statutory and Constitutional law.

VIII. When deciding a jurisdictional question based on facts, a reviewing court has the duty to review the entire record and find the jurisdictional facts within the entire record.

IX. Novel issues regarding State and federal constitutional challenge to newly revised statutory law in S.C. Code Section 15-36-10 support review.

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CERTIFICATE OF COUNSEL

Counsel certifies that petitioner's Amended Notice of Appeal was timely filed by and through Counsel on April 21, 2017, prior to return of Remittitur and within 30 days of receipt of written notice of entry of the order entered March 14, 2017, with notice thereof postmarked March 16, 2017.

The Clerk of the Court of Appeals by letter dated April 26, 2017, requested a filing fee because she mistakenly characterized the Amended Notice of Appeal as a motion for reinstatement.

Thereafter, the Clerk of the Court of Appeals mistakenly calendared the motion for reinstatement as a petition for rehearing which was wrongfully denied pursuant to improper, more burdensome standard of review.

By and through Counsel, petitioner's petition for rehearing was timely filed, however, the Clerk of the Court of Appeals wrongfully returned the petition for rehearing falsely claiming that the petition for rehearing was a second successive petition for rehearing. The record reflects there had been no prior petition for rehearing and therefore, the petition for rehearing was not a second successive petition for rehearing.

In sum, the petition for rehearing was timely filed by and through Counsel of Record but was wrongfully returned by the Clerk of the Court of Appeals. Remand for disposition on the timely filed petition for rehearing would be welcomed.

ISSUES PRESENTED

- I. The order is appealable under S.C. Code Section 14-3-330(1).
- II. The Order is appealable under S.C. Code Section 14-3-330(2).
- III. The Order is appealable under S.C. Code Section 14-3-330(3).
- IV. The order is appealable under S.C. Code Section 14-3-330(4).
- V. Pursuant to Rule 205, SCACR, the appellate court obtains exclusive jurisdiction upon the timely service of the notice of appeal.
- VI. The money judgment exception to automatic stay does not apply because the matter herein does not constitute a “money judgment” in the underlying claim within the contemplation of S.C. Code Section 18-9-130; rather the matter is incidental to the underlying claim.
- VII. The lower court’s reliance on the December 2009 order is a violation of State and federal statutory and Constitutional law.
- VIII. When deciding a jurisdictional question based on facts, a reviewing court has the duty to review the entire record and find the jurisdictional facts within the entire record.
- IX. Novel issues regarding State and federal constitutional challenge to newly revised statutory law in S.C. Code Section 15-36-10 support review.

STATEMENT OF THE CASE

The lower appellate court order entered March 14, 2017, was timely appealed by notice of appeal filed and served by Attorney for the Appellant on April 21, 2017. See attached notice of appeal and certificate of service. Written notice of the lower court order entered March 14, 2017, was postmarked on March 16, 2017, and received on March 24, 2017. See attached affidavit. Accordingly, pursuant to Rule 203, SCACR, the notice of appeal was timely served within 30 days after receipt of written notice of entry of the order.

The Clerk of the Court of Appeals by letter dated April 26, 2017, requested a filing fee because she mistakenly characterized the Amended Notice of Appeal as a motion for reinstatement.

Thereafter, the Clerk of the Court of Appeals mistakenly calendared the motion for reinstatement as a petition for rehearing which was wrongfully denied pursuant to improper, more burdensome standard of review.

By and through Counsel, petitioner's petition for rehearing was timely filed, however, the Clerk of the Court of Appeals wrongfully returned the petition for rehearing falsely claiming that the petition for rehearing was a second successive petition for rehearing. The record reflects there had been no prior petition for rehearing and therefore, the petition for rehearing was not a second successive petition for rehearing.

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ARGUMENT

I. The order is appealable under S.C. Code Section 14-3-330(1).

The order is appealable under S.C. Code Section 14-3-330(1) because it involves the merits. An order “involving the merits” is one that “must finally determine some substantial matter forming the whole or a part of some cause of action or defense.” *Mid-State Distributors, Inc., v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993). In this case, the appellant is denied any defense or ability to file objections thereby “necessarily affecting the judgment.” *Link v. School District of Pickens Cty.*, 302 S.C. 1, 393 S.E.2d 176 (1990).

II. The Order is appealable under S.C. Code Section 14-3-330(2).

The order is appealable under S.C. Code Section 14-3-330(2)(a) because it affects a substantial right when such order “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action.” In this case, the party is effectively foreclosed from contesting the case on the merits which affects a substantial right and is immediately appealable. *McLaughlin v. Strickland*, 279 513, 309 787 (Ct. App. 1983).

The order is appealable under S.C. Code Section 14-3-330(2)(c) because it affects a substantial right when such order “strikes out an answer or any part thereof or any pleading in any action.” This case involves striking any and all pleadings, answers, and/or defense, therefore, there is no record for meaningful judicial review on appeal necessarily preventing vindication on appeal. The Order must be immediately appealed. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005).

III. The Order is appealable under S.C. Code Section 14-3-330(3).

The order is appealable under S.C. Code Section 14-3-330(3) which allows appellate review of orders affecting a substantial right “made in any special proceeding or upon a summary application in any action after judgment.” In the instant case, the lower court proceeding is not a traditional action. It is a “special proceeding.” See *Allen v. Partlow*, 3 S.C. 417 (1872). Denial of the right to defend and to file affects a substantial right in this special proceeding. The Order is appealable.

IV. The order is appealable under S.C. Code Section 14-3-330(4).

The order is appealable under S.C. Code Section 14-3-330(4) because it is an interlocutory order or decree ... “granting, continuing, modifying, or refusing the appointment of a receiver.” S.C. Code Section 14-3-330(4). The March 14, 2017, order provides “thereafter a receiver will be appointed.” March, 14, 2017, Order on appeal. Accordingly, the order is appealable under S.C. Code Section 14-3-330(4). See *Williams v. Northwestern Securities Life Ins. Co.*, 307 S.C. 462, 415 S.E.2d 809 (1992).

V. Pursuant to Rule 205, SCACR, the appellate court obtains exclusive jurisdiction upon the timely service of the notice of appeal.

The Court of Appeals has such jurisdiction as the General Assembly prescribes by general law. S.C. Const. art. V, § 9. Its jurisdiction under S.C. Code §14-8-200(a) is as follows:

[T]he court shall have jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit or family court. S.C. Code §14-8-200(a).

The Court of Appeals is an error-correction court. S.C. Const. art. V, § 9. In a direct appeal, the focus is on the propriety of rulings made by the circuit court. See *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999). Toal *et al.*, *Appellate Practice in South Carolina* (3d ed. 2016), p. 11. The instant matter is a direct appeal. Under Rules 205 and 241, SCACR, the lower court may not act or issue orders that affect an issue on appeal. In this case, the right to represent oneself, to have access to the court, to file, and/or to defend is closely related to the right to a particular mode of trial, a well-established substantial right, and this order must be immediately appealed. S.C. Code Section 14-3-330(2); see *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005); *Brooks v. SCCID and OID*, South Carolina Court of Appeals, decided February 15, 2017, App. Case No. 2014-002477 (Remittitur sent March 3, 2017).

New case law in the *Brooks* case, *infra*, provides that the South Carolina Constitution guarantees every person the right of access to the courts. S.C. Const. art. I, § 9 provides, “All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.” A litigant has a statutory right to proceed pro se in South Carolina. S.C. Code Ann. § 40-5-80 (2011) (“[The chapter regulating the practice of law] may not be construed so as to prevent a citizen from prosecuting or defending his own cause, if he so desires.”); *Washington v. Washington*, 308 S.C. 549, 550, 419 S.E.2d 779, 780 (1992). The statutory right of self-representation is also provided to litigants under federal law. 28 U.S.C. § 1654 (2016). *Brooks v. SCCID and OID*, South Carolina Court of Appeals, decided February 15, 2017, App. Case No. 2014-002477 (Remittitur sent March 3, 2017). In this case, the right to represent oneself, to have access to the court, to file, and/or to defend is closely related to the right to a particular mode of trial, a well-established substantial right, and this order must be immediately appealed. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005).

VI. The money judgment exception to automatic stay does not apply because the matter herein does not constitute a “money judgment” in the underlying claim within the contemplation of S.C. Code Section 18-9-130; rather the matter is incidental to the underlying claim.

The money judgment exception to automatic stay does not apply because the matter herein does not constitute a “money judgment” in the underlying claim within the contemplation of S.C. Code Section 18-9-130; rather the matter is incidental to the underlying claim. *State v. Cooper*, 342 S.C. 389, 536 S.E.2d 870 (2000); Toal *et al*, *Appellate Practice in South Carolina*, 3rd edition (2016), p. 341. In the instant case, the underlying claims ended with directed verdict for the defendants. Significantly and materially, there was no counterclaim. Accordingly, the matter herein is not a traditional money judgment and, therefore, it is subject to automatic stay under Rule 241(a), SCACR. Toal *et al*, *Appellate Practice in South Carolina*, 3rd edition (2016), p. 340. In the alternative, any dispute regarding the application of automatic stay is resolved in the appellate court. *See Kearney v. Allen*, 287 S.C. 324, 338 S.E.2d 335 (2014). In this case, the right to represent oneself, to have access to the court, to file, and/or to defend is closely related to the right to a particular mode of trial, a well-established substantial right, and this order must be immediately appealed. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005).

VII. The lower court’s reliance on the December 2009 order is a violation of State and federal statutory and Constitutional law.

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VIII. When deciding a jurisdictional question based on facts, a reviewing court has the duty to review the entire record and find the jurisdictional facts within the entire record.

When deciding a jurisdictional question based on facts, a reviewing court has the power and the duty to review the entire record, find the jurisdictional facts within the entire record, and decide the jurisdictional question in accord with the preponderance of evidence. *Canady v. Chas. Cty. Sch. Dist.*, 265 S.C. 21, 216 S.E.2d 755 (1975). It is respectfully submitted there is no adequate record to make a finding on the jurisdictional question.

IX. Novel issues regarding new legislation and new statutory law support review.

When a case contains a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. *Osprey Inc., v. Cabana Limited Partnership*, 340 367, 532 269 (2000). It is respectfully submitted that novel issues regarding the revised S.C. Code Section 15-36-10 support review.

CONCLUSION

For the reasons stated and for substantial justice affecting substantial rights, the petitioner respectfully seeks writ of certiorari with abeyance.

Respectfully submitted,

Date 8-9-17



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PROOF OF SERVICE

I certify that I have served a copy of the foregoing including Appendix on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed at 1201 Main St. #2200, Columbia, SC 29201, on this date.

Date 8-9-17



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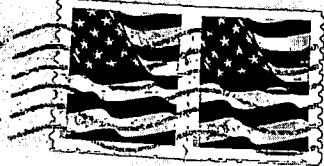
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