

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

Doyet A. Early, III, Circuit Court Judge
L. Casey Manning, Circuit Court Judge

Appellate Case No.2017-001899

RECEIVED

OCT 02 2017

SC Court of Appeals

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B.; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L., and Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown, Respondents

and

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; individually and on behalf of her minor child, JAMES B.; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN - LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children, SYDNEY L., CARRINGTON L., and TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN Respondents,¹

v.

Adele J. Pope Appellant.

MEMORANDUM OF ATTORNEY GENERAL RE APPEALABILITY

Attorney General Wilson submits this memorandum in response to this Court's request

¹ Appellant's Notice of Appeal appears to omit the name of Tommie Rae Brown from the beginning of the second line of the second paragraph of the caption.

that counsel submit a memorandum addressing the issue of appealability of the orders that are challenged on appeal. These Orders are as follows:

1. Order of the Honorable Doyet A. Early, III Denying Defendant's Motion to Alter or Amend Order Dropping Attorney General as a Party, dated August 2, 2017 and received by Appellant on August 14, 2017.
2. Order of the Honorable Doyet A. Early, III Granting Attorney General's Motion to be Dropped as a Party, dated May 31, 2017, and received by Appellant on July 10, 2017.
3. Order of the Honorable Doyet A. Early, III Granting Motion for Protective Order as to Deposition of Attorney General, dated September 21, 2016, filed October 3, 2016 and received by Appellant on September 30, 2016.
4. Order of the Honorable L. Casey Manning Concerning Defendant Adele Pope's Motion to Disqualify Sweeny, Wingate and Barrow, P.A. from Representing the Office of the Attorney General of South Carolina, Enjoining Russell Bauknight from Purporting to Speak for the Office of the Attorney General, and Other Relief, dated and filed July 5, 2015.
5. Order of the Honorable L. Casey Manning Granting Plaintiffs' Motion to Set Aside Entry of Default, dated and filed October 13, 2012.

The Attorney General addresses Orders 1, 2 and 3 above. He believes that Sweeny Wingate and Barrow will address orders 4 and 5 as that firm handled those matters.

Under the authority of this Court discussed below, Orders 1, 2 and 3, above, are not currently appealable. *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 578, 698 S.E.2d 856, 862 (Ct. App. 2010). The following rule and statute have bearing on appealability and have been the subject of discussion in case law and in the book written by the former Chief Justice, Toal, J. H., Walker, A. W. and Baker, Margaret E., (2016), *Appellate Practice in South Carolina*, 3d Ed.: S.C. Bar.

Rule 54(b), SCRCP provides as follows:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

S.C. Code Ann. §14-3-330 (1) and (2) contains the following provisions:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
- (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;

The question under this authority is whether the absence of certification² of a judgment by the Circuit Court under Rule 54 as to Orders 1, 2 and 3, prevents an immediate appeal from being taken under §14-3-330. This authority is best addressed, first, as to the Order dropping the

² “The process of directing entry of judgment on one or more but less than all claims under Rule 54(b) will be referred to as certification.” *Link v. School Dist. of Pickens County*, 302 S.C. 1, 4 393 S.E.2d 176, 177,(1990).

Attorney General as a party and the Order denying the Motion to Alter or Amend that Order.

As to an order granting summary judgment as to one but not all causes of action, the Supreme Court held that “[w]hile we agree that the order granting summary judgment may be appealable under § 14-3-330(2)(c) because it has the effect of striking out a pleading, the order is also appealable under § 14-3-330(1) as “involving merits.” *Link v. School Dist. of Pickens County*, 393 S.E.2d 176, 179, 302 S.C. 1, 6 (1990). Appellant Link appealed only that order and waited to do so until after trial when he lost on other causes of action. Although the Court found that Link was not required to appeal that summary judgment order immediately prior to trial, the Court also found that the lack of certification under Rule 54 did not prevent the Order from being immediately appealable under §14-3-330.

Link cited *Lebovitz v. Mudd*, 289 S.C. 476, 479 347 S.E.2d 94, 96 (1986) which said that “[a]n order granting a Rule 12(b) motion as to one of multiple claims is directly appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading. *See Miles v. Charleston Light & Water Co.*, 87 S.C. 254, 69 S.E. 292 (1910) (order granting demurrer as to portion of complaint). The order is therefore subject to immediate appeal notwithstanding the refusal to certify under Rule 54(b).”

Although the above Supreme Court authority suggests that an order removing one party, such as the Attorney General here, or one cause of action but not all parties or claims may be immediately appealable, a more recent Court of Appeals decision held otherwise. *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 574, 698 S.E.2d 856, 860 (Ct. App. 2010) concluded that, absent Rule 54 certification, an appeal could not be taken from directed verdict rulings on some but not all causes of action when the case was mistried and subject to retrial:

this court has had the opportunity to explore the application of Rule 54(b), finding the time to file post-trial motions did not begin to run until all claims had been adjudicated, where there was no “express determination” that there was no reason for delay in entering judgment on the previously adjudicated claims. *Holroyd v. Requa*, 361 S.C. 43, 53–54, 603 S.E.2d 417, 422 (Ct.App.2004). This court has also held that Rule 54(b) does not require certification, but if the court chooses to certify a judgment, it must do so in a definite and unmistakable manner. *Tommy L. Griffin Plumbing & Heating, Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 466, 570 S.E.2d 197, 200 (Ct.App.2002). Federal Rule 54(b) is substantially similar to the South Carolina rule. See Fed.R.Civ.P. 54(b). Under the federal rule, “[a]bsent a certification under Rule 54(b) any order in a ... multiple [] claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory.” Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2654 (3d ed.2010). “[A]n appeal from a decision adjudicating a portion of the case must be dismissed.” 10 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 2660 (3d ed.2010).

698 S.E. 2d at 861. *Ashenfelder* clearly indicated that certification under Rule 54(b) is required before an immediate appeal can be pursued as to an order addressing only part of the case. As noted, no certification was issued in the instant case although the circuit court denied the Rule 59 Motion to Alter or Amend.

Ashenfelder did not cite or address *Lebovitz* and appears to distinguish *Link* because that case declined to address whether certification made an immediate appeal mandatory. The question is not presented here of whether an appeal is mandatory. Although *Link and Lebovitz* indicate that certification is not necessary for an immediate appeal, *Ashenfelder* held that certification is necessary.

Appellate Advocacy may come to the same conclusion as *Ashenfelder*. Although the treatise states that “[l]ack of Rule 54(b) certification . . . does not preclude immediate appeal of order which is immediately appealable under section §14-3-330[citing *Lebovitz*][page 160],” this sentence is followed by others suggesting that certification is necessary when fewer than all are adjudicated. *Appellate Advocacy* at p. 161 citing *Ashenfelder*. (“In *Ashenfelder*, the Court of

Appeals found the directed verdicts remained subject to revision because the trial court did not include an express determination that no reason existed for the delay; therefore, it was premature to determine appealability on the merits.”).

Although the Circuit Court denied the Rule 59 Motion to Alter or Amend the Order dropping the Attorney General as a party, the Appellant did not request that the Judge certify his decisions under Rule 54, and he did not do so. That step appears to be required under *Ashenfelder*. Therefore, the Orders granting the Motion to be Dropped and denying the Rule 59 Motion are not immediately appealable.

These same conclusions would apply to the Order granting a protective order as to the deposition of the Attorney General. Moreover, “[o]rdinarily, a discovery order is not immediately appealable. *Grosshuesch v. Cramer*, 377 S.C. 12, 659 S.E. 2d 112 (2008).” *Appellate Advocacy*, p. 152. Although writs of certiorari have been issued to review discovery orders in exceptional circumstances, Appellant does not seek a writ here, nor are the circumstances exceptional *Id.* at p. 153. Cases cited in *Appellate Advocacy* as exceptions dealt with abusive or harmful discovery or novel questions about compelled discovery rather than the denial of a discovery request here. *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Env'tl. Control*, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010); *Hollman v. Woolfson*, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009); *Hollman v. Woolfson*, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009). As stated in *Oncology*, the Court’s “willingness to review a discovery order by way of a writ of certiorari will be as rare as the proverbial ‘hen's tooth.’” 692 S.E.2d at 924. The Order issuing a protective order is not subject to review under these standards by way of this appeal.

For the foregoing reasons, the Attorney General respectfully requests that the appeal be dismissed as to the Orders dropping the Attorney General, denying the Rule 59 Motion as to that ruling, and granting the protective order.

Respectfully submitted,

ALAN WILSON
Attorney General

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October 2, 2017

THE STATE OF SOUTH CAROLINA
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Doyet A. Early, Ill, Circuit Court Judge
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v.

Adele J. Pope Appellant.

CERTIFICATE OF SERVICE

I hereby certify that I have served the Memorandum of the Attorney General regarding Appealability upon counsel for the other parties by mailing copies to them at the addresses below

CERTIFICATE OF SERVICE

Bauknight v. Pope 17-001899

October 2, 2017

Page 2

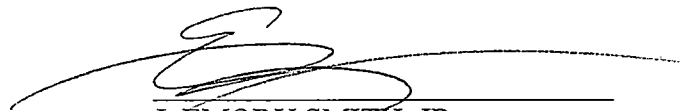
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ALAN WILSON
ATTORNEY GENERAL

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
HAND DELIVERY

Re: Bauknight v. Pope, Appellate Case No. 2017-001523

Dear Ms. Kitchings:

Enclosed for filing with your Office are the original and six copies of the Memorandum of the Attorney General regarding Appealability together with a certificate of service. Please confirm filing by stamping the additional copy of this Return.

Thank you for your assistance.

Sincerely,

J. Emory Smith, Jr.
Deputy Solicitor General
Counsel for the Attorney General

cc: Adam T. Silvernail, Esquire
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