

**THE STATE OF SOUTH CAROLINA**  
**In the Court of Appeals**

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**APPEAL FROM YORK COUNTY**  
**Court of Common Pleas**

**S. Jackson Kimball, Special Circuit Court Judge**

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**Case No. 2017-CP-46-1001**  
**Appellate Case No.: 2017-000600**

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**OCT 03 2017**

**SC Court of Appeals**

**Alfred and Mary Jenkins ..... Respondents**

**v.**

**Ferrara-Buist Company, LLC, d/b/a Custom Crafted Homes ..... Appellant**

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**INITIAL BRIEF OF RESPONDENTS**

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**TABLE OF CONTENTS**

Table of Authorities.....ii

Statement of Issues on Appeal.....1

Statement of the Case.....2

Statement of Facts.....3

Standard of Review.....6

Argument

    I.    THE APPEAL SHOULD BE DISMISSED AS INTERLOCUTORY  
          BECAUSE THE ORDER APPEALED DID NOT ADDRESS THE MERTIS  
          OF THE CASE, WHICH WILL BE LITIGATED.....6

    II.   THE TRIAL COURT PROPERLY RULED THAT FB WAS NOT ENTITLED  
          TO HAVE JENKINS’ MONEY HELD AS SECURITY FOR A POSSIBLE  
          RECOVERY.....8

Conclusion.....10

**TABLE OF AUTHORITIES**

**CASES**

*Baldwin Construction Co., Inv. v. Graham*, 357 S.C.227, 593 S.E.2d 146 (2004).....7

*Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777, 780  
(1993).....7

*Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144,  
146 (2015).....8

*Stone v. Thompson*, 418 S.C. 599, 605, 795 S.E.2d 49, 52 (Ct. App. 2016).....7

*Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 302-04, 705 S.E.2d 475, 478-79 (Ct. App.  
2011).....8

*Tillman v. Tillman*, case no. 2015-001291, opinion no. 5493, p.2 (Ct. App. 2017).....7, 8

*Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).....6

*Watson v. Underwood*, 407 S.C. 443, 756 S.E.2d 155 (2014).....7

**OTHER AUTHORITIES**

South Carolina Code § 14-3-330.....8

**STATEMENT OF ISSUES ON APPEAL**

- I. **SHOULD THE APPEAL BE DISMISSED AS INTERLOCUTORY BECAUSE THE ORDER APPEALED DID NOT ADDRESS THE MERITS OF THE CASE, WHICH WILL BE LITIGATED?**
  
- II. **DID THE TRIAL COURT PROPERLY RULE THAT FB WAS NOT ENTITLED TO HAVE JENKINS' MONEY HELD AS SECURITY FOR A POSSIBLE RECOVERY?**

## STATEMENT OF THE CASE

Respondents Alfred Jenkins and Mary Jenkins (“Jenkins” or “Respondents”) filed a Lis Pendens on March 21, 2016, and filed their Complaint on April 1, 2016, asserting claims for equitable lien, restitution and breach of contract. Appellant Ferrara Buist Company, LLC (“FB” or “Appellant”) answered on April 28, 2016 and asserted counterclaims for breach of contract, slander of title, cloud on title, and injunction. An order was entered on July 25, 2016, consented to by the parties, requiring FB to deposit funds with the Clerk of Court “pending agreement by the Parties or further order of the court.” The funds deposited were equal to the payments made by Jenkins to FB over the course of the construction, and the agreement and removal of the lis pendens allowed a sale to a third party to be closed. On September 29, 2016, Jenkins filed a motion seeking the release of the funds held in trust by the clerk. A hearing was held on November 17, 2016.

On November 28, 2016, the Honorable S. Jackson Kimball issued an Order releasing to Jenkins the total amount of the funds held by the clerk. As stated in the Order, all other issues, including the underlying claims and counterclaims, were reserved for trial.

On December 2, 2016, FB filed a motion to reconsider. A hearing was held on February 16, 2017. The motion to reconsider was denied by Order dated February 20, 2017.

On March 8, 2017, FB filed a Notice of Appeal of Judge Kimball’s November 28, 2016 Order. On April 3, 2017, Jenkins filed a motion to dismiss the appeal on the ground that Judge Kimball’s Order is interlocutory in nature and did not finally decide any issue

raised by the pleadings. On May 4, 2017, the Court of Appeals denied the motion to dismiss the appeal, but added “[n]othing precludes the parties from raising appealability in their briefs.”

### **STATEMENT OF FACTS**

On August 22, 2015, Jenkins signed a contract with FB whereby FB agreed to build a house on property owned by FB and to sell the lot and completed house to Jenkins. [Complaint ¶4 and Exhibit 1 thereto] The original contract price was \$741,095.00. [Id.] Jenkins did not secure a construction loan, and intended to pay for the completed house with funds from an unsecured line of credit.

Thereafter, FB began construction of the house. Despite the fact that the contract does not provide for interim partial payments to FB, FB began submitting periodic interim partial payment requests to Jenkins. With the exception of the last (sixth) pay request, every pay request was paid in full. The total amount paid from Jenkins to FB was \$643,760.70. [Complaint ¶¶ 10-11]

Throughout the course of construction, Jenkins raised concerns about FB’s compliance with the plans and specifications and the quality of construction. Following submittal of the last pay request, the contract was terminated for failure of FB to correct deficiencies in the construction, and by FB’s repudiation of the contract. [Complaint ¶¶ 11-18] Jenkins demanded return of all funds paid to FB, but FB failed to refund the money paid.

At the time the contract was terminated, the total amended contract price was \$881,868.63 as a result of several changes upon which the parties agreed. When the contract was terminated, Jenkins had paid FB \$643,760.70 and FB held title to the

property. [Complaint ¶ 10] There was no mortgage on the property securing payments made by Jenkins.

Following termination of the contract, Jenkins filed the lis pendens and the complaint against FB. After the contract was terminated, FB had put the house for sale on the market. To everyone's benefit, a second contract for the sale of the house to a third party was quickly secured. The second contract price was \$850,000.00 [Ferrara Aff. Exhibits] In order to allow the second contract to close, Jenkins and FB agreed that Jenkins would lift the Lis Pendens in return for an agreement that the total amount that Jenkins had paid toward the property would be held in trust by the clerk until the parties reached an agreement or upon further order of the Court. The parties' agreement was entered as a consent Order dated July 25, 2016. Pursuant to the Order, \$663,395.37<sup>1</sup> of the closing proceeds was deposited in trust with the York County Clerk of Court. The balance of the closing proceeds, \$160,588.96, was paid to FB at closing.

A snapshot of the scenario at closing of the sale to the third party is as follows. Jenkins had paid to FB \$643,760.70 and had received nothing in return, either by way of deed, mortgage or other security. FB had been paid \$643,760.70 by Jenkins and was to receive an additional \$850,000.00 for a total of \$1,493,760.70. Because Jenkins had filed a lis pendens, the parties agreed that the funds paid by Jenkins would be deposited with the clerk, and the lis pendens was lifted so the transaction could close. After the deposit with the clerk and the proceeds paid to FB from the closing, FB retained \$804,349.66 relating to the house and property that Jenkins contracted for, but which was sold to the third party.

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<sup>1</sup> The amount increased by about \$19,000 from the amounts paid by Jenkins based on the value of appliances and a ceiling fan paid by Jenkins and installed in the house. [Order p. 2]

Subsequent to the Order depositing funds with the clerk of court, Jenkins filed a motion titled “Motion for Partial Summary Judgment” that sought a release of the funds on deposit with the clerk to Jenkins. The obvious basis for the Motion was that FB had been paid nearly the entire balance of the contract price not counting the funds deposited with the clerk, and it was simply inequitable for Jenkins’ payments to be held as a security in case FB were to recover some amount on the underlying contract claims. On those underlying claims, either party, like all litigants, can collect on any judgment through the normal procedures.

At the hearing, the Court and the parties discussed whether the motion was actually for partial summary judgment. The Court clearly determined that the motion did not actually seek a judgment of any sort.

THE COURT: Well, here – what I’m thinking is that he may have used – that the term summary judgment isn’t the appropriate thing to apply to all this. You’re not – ‘cause you’re telling me everybody’s preserving their claims; right?

MR. HAMILTON [counsel for Jenkins]: Correct.

[Transcript of Hearing p.15 l.13-18]

\* \* \*

THE COURT: I think that, if I understand what Mr. Hamilton’s asking for, the term summary judgment is not appropriate... It doesn’t seem to me like it is equitable for – to sustain a fund from which somebody could collect. I do not think he’s entitled to summary judgment. That’s not what we’re talking about.

MR. FERRARA [counsel for FB]: Yes, sir.

[Transcript of Hearing p.17 l.18-20, p.18 l.5-9]

\* \* \*

THE COURT: It isn't summary judgment, because I'm not deciding the liability issue that both of you still have...

[Transcript of Hearing p.25 1.16-17]

In its Order, the Court also made it clear that it was not granting a judgment or deciding any of the underlying claims:

By ruling in the manner described, the Court is not ruling upon or granting judgment of any kind as to the claims of either party and makes no determination as to any entitlement to damages due either party. . . Defendant has no claim that needs to be protected and has no right at law or in equity for security for its claim for damages in this action.

[Order P.3].

### **STANDARD OF REVIEW**

On appeal from an equitable action, an appellate court may find facts in accordance with its own view of the evidence. *Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). While this standard permits a broad scope of review, an appellate court will not disregard the findings of the trial court. *Id.*

### **ARGUMENT**

The Appeal should be dismissed because it is interlocutory. The Order appealed from merely resolved a preliminary issue regarding funds held by the clerk of court, and did not reach the merits of the underlying case at all. Those remain to be litigated.

In any event, the trial court's ruling regarding the release of funds was correct, and Appellant makes no arguments against the actual decision below. Therefore, if not dismissed, the decision should be affirmed.

**I. THE APPEAL SHOULD BE DISMISSED AS INTERLOCUTORY BECAUSE THE ORDER APPEALED DID NOT ADDRESS THE MERITS OF THE CASE, WHICH WILL BE LITIGATED.**

An appeal ordinarily may be pursued only after a party has obtained a final judgment. *Watson v. Underwood*, 407 S.C. 443, 756 S.E.2d 155 (2014). “An order usually will be deemed interlocutory and not immediately appealable when there is some other act that must be done by the trial court prior to a determination of the parties’ rights.” *Id.* In *Stone v. Thompson*, 418 S.C. 599, 605, 795 S.E.2d 49, 52 (Ct. App. 2016), the family court filed an order holding that the parties were common law married, but had not addressed the issues of divorce and equitable distribution. An appeal was filed, but was held to be interlocutory. “[B]ecause the order in this case does not bring the litigants to ‘the end of the road’ and requires further action by the court, [we find] the order is not immediately appealable.” *Id.* See also. *Baldwin Construction Co., Inv. v. Graham*, 357 S.C.227, 593 S.E.2d 146 (2004) (appeal from the denial of a motion to amend an answer is interlocutory); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777, 780 (1993) (“If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory”); *Tillman v. Tillman*, case no. 2015-001291, opinion no. 5493, p.2 (Ct. App. 2017) (“A final judgment is one that ends the action and leaves the court with nothing to do but enforce the judgment by execution”).

Here, the Order appealed did not reach the merits of the underlying case, and every aspect of the case after the pleadings remains to be determined. In the Order appealed, the court below held: “By ruling in the manner described, the Court is not ruling upon or granting judgment of any kind as to the claims of either party and makes no determination as to any entitlement to damages due either party.” [Order p.3] Plainly, the Order appealed is interlocutory because the parties’ rights remain to be determined.

## II. THE TRIAL COURT PROPERLY RULED THAT FB WAS NOT ENTITLED TO HAVE JENKINS' MONEY HELD AS SECURITY FOR A POSSIBLE RECOVERY

FB's arguments on appeal confuse two very different aspects of the case: (1) the pre-trial Order relating to disposition of the funds deposited with the clerk of court, and (2) the underlying merits of the case involving which party breached the contract regarding construction of the house. The appeal addresses only the latter, but the Order addresses only the former.

The two issues on appeal asserted by FB are (1) that disputed issues of fact exist, and (2) that an equitable remedy was inappropriate because a legal remedy is available. Both of these issues misconstrue the order appealed from, which did not grant summary judgment or address the merits of the underlying case.

FB's entire premise – that the court below granted summary judgment – is incorrect. Although the motion was styled a motion for partial summary judgment<sup>2</sup>, the issue before the Court was whether FB was entitled to have the funds on deposit with the clerk held as security in the event that it were to be awarded a judgment later in the case on the underlying contract claims. In fact, the Order expressly states that it is not granting summary judgment: “Although Plaintiffs’ motion is titled as a motion for partial summary judgment, it is in essence simply a motion seeking the exercise of the equitable powers of the Court to place the parties in the position they would have been in as a result of a sale of the house by Plaintiffs, without affecting any party’s claim for breach of

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<sup>2</sup> “To avoid circuitous litigation and needless appeals, we construe section § 14-3-330 narrowly, eyeing the nature and effect of the order, not merely its label.” *Tillman v. Tillman*, case no. 2015-001291, opinion no. 5493, p.4 (Ct. App. 2017); see *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015); *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 302-04, 705 S.E.2d 475, 478-79 (Ct. App. 2011).

contract.” [Order p. 2] Further, the Order clearly states that it is not ruling on the merits of the case: “By ruling in the manner described, the Court is not ruling upon, or granting judgment of any kind, as to the claims of either party, and makes no determination as to any entitlement to damages due either party.” [Order p.3]

This decision by the lower court that Jenkins’ funds were not to be held as security<sup>3</sup> for a possible recovery in the underlying case is clearly correct, and logically followed the consent Order of July 25, 2016. That Order, which was consented to by all parties (and was not appealed), required the exact amount of funds and improvements paid by Jenkins to be deposited with the clerk. [Order of 7-25-16]. It also expressly ordered the clerk to hold the proceeds pending agreement by the parties “*or further order of this court.*” [Id.] (emphasis added). The subsequent Order that was appealed simply addressed the disposition of the funds without the necessity of reaching the underlying breach of contract and other claims. Those remain to be litigated.

In its brief, Appellant contends that disputed issues of fact exist, but it merely references an affidavit that alleges facts relating to the underlying breach of contract claim and counterclaim. [App. Br. P.6]. Appellant does not and cannot reference *any* disputed fact regarding the disposition of the funds on deposit with the clerk. There are no disputed facts regarding the issue actually decided below.

Similarly, Appellant’s contention that an equitable remedy was inappropriate because a legal remedy exists misses the mark. Again, in its brief Appellant references the underlying breach of contract claims to support its argument. [App. Br. P.7-8] The breach of contract and other claims may have legal remedies, and will be litigated and

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<sup>3</sup> The unfairness and hardship to Jenkins of withholding \$663,395.37 of their money, and the possible impact on their ability to pay for their legal representation, likely entered into the equitable calculation, as it should.

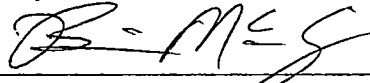
decided later in this case, but those remedies have nothing to do with issue that actually was addressed.

**CONCLUSION**

For the reasons set forth above, the appeal should be dismissed as interlocutory, or the lower court's decision affirmed.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

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SC Court of Appeals

S. Jackson Kimball, Master in Equity for York County

Appellate Case No. 2017-000600

Alfred and Mary Jenkins,

Respondents,

v.

Ferrara-Buist Company, LLC, d/b/a Custom Crafted Homes,

Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Designation of Matter to Be Included in the Record on Appeal on the following counsel or person of record:

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Attorney for Appellant

By depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to those attorney(s) and/or persons set out above, pursuant to Rule 262, S.C.A.C.R.

September 29, 2017



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September 29, 2017

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SC Court of Appeals

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

*Re: Alfred and Mary Jenkins vs. Ferrara-Buist Company, LLC*  
*Case No.: 2017-000600*

Dear Ms. Kitchings:

Enclosed please find an original and a copy of the following:

- (1) Initial Brief of Respondent;
- (2) Respondents Designation of Matter to be Included in the Record on Appeal;
- (3) Proof of Service;

Please file the originals and return the filed, stamped copies in the envelope provided. By copy hereof, we are serving counsel of record.

Thank you and best regards.

Very Truly Yours,

McCOY LAW FIRM, LLC

  
Brian S. McCoy

BSM:mep  
Enclosures

CC: Paul B. Ferrara, III, Esq.  
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