

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

OCT 16 2017

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

SG Court of Appeals

Case No. 2010-CP-40-4900

Appeal Tracking No. 2017-001523

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. II; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

And

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. II; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown, Respondents,

v.

Adele J. Pope and Robert L. Buchanan, Jr., Defendants,

Of whom Adele J. Pope is the Appellant.

RESPONDENTS' MEMORANDUM ADDRESSING THE ISSUE OF APPEALABILITY

Respondents, submit this memorandum in response to this Court's request 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.

Respondents address Orders 4 and 5 above. The Attorney General has already addressed Orders 1, 2, and 3 above. Those arguments are adopted and incorporated to the extent not inconsistent with the argument set forth herein.

LEGAL STANDARD

The South Carolina Code governs the appealability of actions. “An appeal may be taken to the Supreme Court or the Court of Appeals in the cases mentioned in Sections 14-3-320 and 14-3-330.” S.C. Code Ann. § 18-9-10. Sections 14-3-330(1)-(2) govern appeals of intermediate judgments involving the merits and orders affecting substantial rights of the parties:

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[.]

S.C. Code Ann. § 14-3-330(1)-(2).

ARGUMENT

I. Under South Carolina law, Orders 4 and 5 are interlocutory and not currently appealable.

The Court should dismiss the appeal of Orders 4 and 5 because they are interlocutory, and therefore not immediately appealable. “As a general rule, only final judgments are appealable.” Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (citing Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996)). “Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.” Ex parte Wilson, 367 S.C. at 12, 625 S.E.2d at 208 (citing Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993)).

“Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within § 14–3–330.” Ex parte Wilson, 367 S.C. at 13, 625 S.E.2d at 208 (citing Baldwin Const. Co., Inc. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004)). “Intermediate orders involving the merits may be immediately appealed pursuant to § 14–3–330(1). An order which involves the merits is one that ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense.’” Ex parte Wilson, 367 S.C. at 13, 625 S.E.2d at 208 (quoting Mid–State Distribs., Inc., 310 S.C. at 334, 426 S.E.2d at 780). “Interlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14–3–330(2). Orders affecting a substantial right ‘discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.’” Ex parte Wilson, 367 S.C. at 13, 625 S.E.2d at 208 (quoting Mid–State Distribs., Inc., 310 S.C. at 335 n. 4, 426 S.E.2d at 780 n. 4).

A. Order 4 is not immediately appealable.

“[A]n order denying a motion to disqualify an attorney is not immediately appealable.” EnerSys Delaware, Inc. v. Hopkins, 401 S.C. 615, 619, 738 S.E.2d 478, 480 (2013). In Hopkins, a litigant moved to disqualify another party’s attorney, but the trial court denied that motion. Id. at 616, 738 S.E.2d at 479. The movant thereafter appealed the order denying appellant’s motion to disqualify an attorney. Id. The South Carolina Supreme Court held that the trial court’s order denying the motion to disqualify an attorney was not immediately appealable because no substantial right was affected by the order. Id. 619, 738 S.E.2d at 480.

Because Order 4 is an order denying a motion to disqualify an attorney, and such orders are not immediately appealable, Order 4 cannot be immediately appealed as a matter of law. Consequently, the Court should dismiss the appeal of Order 4.

B. Order 5 is not immediately appealable.

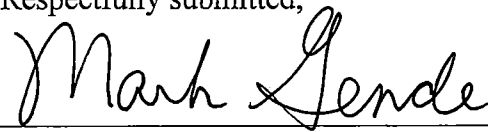
An order to set aside entry of default is not immediately appealable. Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988). In Jefferson, a litigant appealed a trial court's denial of a Rule 6(b) SCRPC motion to file a late answer, but relied on authority relating to orders granting or denying motions to set aside entry of default under Rule 55(c) SCRPC. Id. Even though the Court correctly noted that arguments from Rule 55(c) were not applicable in that case and held the order to be not immediately appealable on other grounds, the Court clarified the appealability of Rule 55(c) orders. Jefferson, 295 S.C. at 317-18, 368 S.E.2d at 456. The Court held "the grant or denial of a Rule 55(c) motion is not directly appealable under S.C. Code Ann. § 14-3-330 (1976)." Id. at 317, 368 S.E.2d at 456.

Because Order 5 sets aside entry of default and such orders are not immediately appealable, Order 5 cannot be immediately appealed as a matter of law. Consequently, the Court should deny appeal of Order 5.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the present appeal be dismissed as to the Orders disqualifying Sweeny, Wingate and Barrow from representing the Attorney General, enjoining Russell Bauknight from Purporting to speak for the Office of the Attorney General, and granting Plaintiffs' Motion to Set Aside Entry of Default.

Respectfully submitted,

A handwritten signature in black ink that reads "Mark Gende". The signature is written in a cursive style with a horizontal line underneath it.

Kenneth B. Wingate

Mark V. Gende, SC Bar #72835

Everett A. Kendall, II, SC Bar #8450

Sweeny, Wingate & Barrow, P.A.

1515 Lady Street

Post Office Box 12129

Columbia, South Carolina 29211

(803) 256-2233

kbw@swblaw.com

eak@swblaw.com

mvg@swblaw.com

ATTORNEYS FOR RESPONDENTS

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Adele J. Pope and Robert L. Buchanan, Jr., Defendants,

Of whom Adele J. Pope is the Appellant.

PROOF OF SERVICE

I certify that I have served the Memorandum on Appealability by depositing a copy of it in the United States Mail, postage prepaid, on October 16, 2017, addressed to the following attorneys of record:

Other Counsel of Record:

W.H. Bundy, Jr., Esquire
Brent McDonald, Esquire
Bundy McDonald, LLC
1516 Old Trolley Road, 2nd Floor
Summerville, SC 29485

and

Daryl L. Williams, Esquire
Gertz & Moore, LLP
P.O. Box 456
Columbia, SC 29202

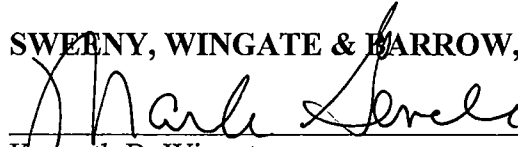
and

Adam T. Silvernail, Esquire
Law Office of Adam T. Silvernail LLC
1905 Marion Street (29201)
P. O. Box 7995
Columbia, SC 29202
Attorneys for Appellant

C. Havird Jones, Jr., Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Attorney for Respondent Attorney General

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



Kenneth B. Wingate

Mark V. Gende

Everett A. Kendall, II

Sweeney, Wingate & Barrow, P.A.

Post Office Box 12129

Columbia, SC 29211

(803) 256-2233

ATTORNEYS FOR RESPONDENTS

Columbia, South Carolina
October 16, 2017

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Reply to: Main Office
Mark V. Gende
(803) 256-2233 x7121
mvg@swblaw.com

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Russell L. Bauknight, et al. v. Adele J. Pope
Civil Action No.: 2010-CP-40-04900/Appellate Case No. 2017-001899
Our File: 4077-7389

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Respondents' Memorandum Addressing The Issue of Appealability and Proof of Service in connection with the above-referenced matter.

Please file the original and return the clocked copy to me via our courier.

Thank you for your assistance, and should you have any questions, please do not hesitate to contact me.

Very truly yours,

SWEENEY, WINGATE & BARROW, P.A.



Mark V. Gende

MVG/dvy

Enclosures

cc: Adam T. Silvernail, Esquire, Law Office of Adam T. Silvernail LLC
C. Havird Jones, Jr., Esquire, Office of the Attorney General
M. Brent McDonald, Bundy McDonald, LLC
Daryl L. Williams, Esquire, Gertz & Moore, LLP
W.H. Bundy, Jr., Esquire, Bundy McDonald, LLC



SWEENY WINGATE & BARROW P.A.

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