

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

SEP 24 2018

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable Charles B. Simmons, Master in Equity

Civil Action No. 2015-CP-23-05935
Appellate Case No. 2018-001687

Jeanne A. Burton, Trustee Appellant,

v.

Triad Grading, LLC, Respondent.

APPELLANT'S MOTION TO DISMISS

Triad Grading, LLC, the Respondent, asks this Court to dismiss the Appellant's Notice of Appeal and Application for Preliminary Injunction because the preliminary oral ruling that the Appellant is attempting to appeal is not an appealable judgment, order, or decision. Under these circumstances, the Court lacks appellate jurisdiction to consider the appeal, and the Appellant has no right to appeal under the appellate court rules. *See* S.C. Code Ann. § 14-3-330; Rule 201(a), SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order or decision.").

PROCEDURAL BACKGROUND

On September 12, 2018, the Honorable Charles B. Simmons, Jr., Greenville County Master-in-Equity, held a hearing to address issues in the supplemental

proceedings between the Appellant and Triad Grading. During this hearing, the Master verbally indicated that he planned to release certain attached/frozen funds in a Triad Grading bank account. The Master opted not to issue a formal final order from the bench, but instead, asked Triad Grading's attorney to prepare a proposed written order for the judge's review. Complying with the Master's request, Triad Grading's attorney submitted a proposed order to the Master and to the Appellant's attorney.

To date, the Master has neither finalized, signed, and filed the written order nor filed a written judgment.

ARGUMENT

This Court should dismiss the appeal in this case because (a) the Court lacks appellate jurisdiction to consider it and (b) the Appellant lacks any right to appeal a preliminary oral ruling made by a judge who expressly stated that he would be filing a formal written order as his final word on the matter.¹

Rule 201(a) of the South Carolina Appellate Court Rules permits a party to appeal from "any final judgment, appealable order or decision." Rule 201(a), SCACR. In addition, the Supreme Court's appellate jurisdiction is primarily limited to appeals from final judgments with some exceptions made in specific instances that are not

¹ In her Notice of Appeal, the Appellant states that she intends to appeal "the decision of the Honorable Charles B. Simmons, Jr. on September 12, 2018." See Notice of Appeal. The Appellant filed this notice despite having been told by the judge on at least two occasions that the oral ruling was not his order and that he would soon be filing a written order. See **Exhibit A** (Email from Judge Charles B. Simmons, Jr.).

applicable to Judge Simmons's preliminary verbal ruling at issue in this case. See S.C. Code Ann. § 14-3-330.

South Carolina courts have long held that a judge's preliminary oral ruling is not a final appealable order. A decision by a South Carolina court is not final until the written judgment and order have been reviewed and approved by the court and, then, entered by the clerk of court. See Rule 58(a)(2), SCRCF (“[U]pon a decision by the court granting other relief . . . , the court shall promptly prepare the form of the judgment, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, and after review and approval by the court, the clerk shall promptly enter it.”) (emphasis added); see also, *First Union Nat'l Bank v. Hitman*, 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct. App. 1991) (“No order is final until written and entered . . . Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly.”); *Case v. Case*, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964) (holding that an oral ruling is of no effect until entered as a written order).

Until the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is subject to the control of the judge, and may by him be withdrawn at any time before such delivery. . . . While the written instrument purporting to be the judgment in a cause remains in the possession of the judge who is to pronounce it, it is of no effect, and like a deed not delivered . . . The Decree must be in writing and until such time the Judge may modify, amend or rescind such an oral Order.

Bayne v. Bass, 302 S.C. 208, 209-10, 394 S.E.2d 726, 727 (Ct. App. 1990)

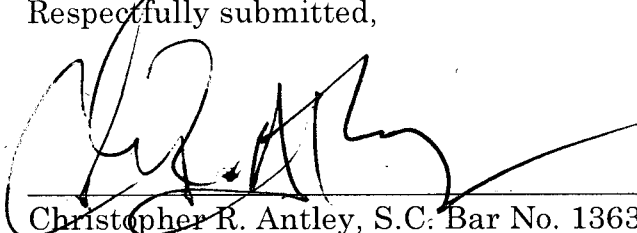
The preliminary oral ruling that the Appellant is attempting to appeal is not an appealable order, judgment, or decision. Because Judge Simmons announced to

the parties that he would be entering a written order and judgment and specifically instructed Triad Grading's attorney to prepare a proposed written order for the court's review, Judge Simmons' preliminary oral ruling is, like the oral decree in *Case v. Case*, "of no effect." And, because the preliminary oral ruling will not preclude the Appellant from appealing the written order once Judge Simmons enters it, the Court lacks jurisdiction, and the Appellant lacks not only right to appeal, but also a good faith basis for filing the notice of appeal and refusing to dismiss it voluntarily.

CONCLUSION

For these reasons, the Court should conclude that it lacks jurisdiction to consider this appeal or the Rule 240 motion for preliminary injunction filed by the Appellant and dismiss both. The Court should also conclude that the Appellant has failed to meet the threshold requirements for establishing a right to appeal under Rule 201(a), SCACR, and dismiss the appeal and all motions filed by the Appellant.

Respectfully submitted,



Christopher R. Antley, S.C. Bar No. 13631
John R. Devlin, Jr. S.C. Bar No. 1667
Devlin & Parkinson, P.A.
P.O. Box 10387
Greenville, South Carolina
Phone: (864) 242-4050/ Fax: (864) 242-4277
crantley@devlinparkinson.com

Attorneys for the Respondent

Date: September 20, 2018
Greenville, South Carolina

Laura Kirwan

From: Simmons, Judge Charles <CSimmons@greenvillecounty.org>
Sent: Thursday, September 13, 2018 6:00 PM
To: Townes Johnson
Cc: Laura Kirwan; Fudge, Wanda; John Devlin
Subject: RE: Jeanee Burton v Triad Grading CA No.: 2015-CP-23-05935

Mr. Johnson,

You are a fine advocate, as is Mr. Devlin, so I certainly understand the need to appeal. The issue presented appears to novel and one that could benefit from appellate guidance and clarification.

From a very practical/procedural standpoint, I would ask that you and Mr. Devlin take a look at Rule 58(a) SCRCP and the cases of *First Union Nat'l Bank v. Hitman, Inc.* 411 SE2d 681 (SC App. 1991) and *Case v. Case* 134 SE2d 394 (SC 1964).

At this point, I'm not sure what the appellate courts can review since a written order has not been filed.

I have great confidence that the two of you will decide the best way to proceed at this point.

Charles B. Simmons, Jr., Judge
Greenville County Courthouse
305 East North Street, Suite 313
Greenville, SC 29601

Phone: (864) 467-8556
Fax: (864) 467-8401

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable Charles B. Simmons, Master in Equity

Civil Action No. 2015-CP-23-05935
Appellate Case No. 2018-001687

Jeanne A. Burton, Trustee..... Appellant,

v.

Triad Grading, LLC..... Respondent.

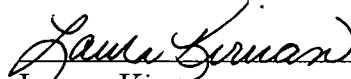
CERTIFICATE OF SERVICE

I certify that on September 20, 2018, I have served the following with a copy of the **Respondent's Motion to Dismiss** by depositing same in the United States Mail, postage prepaid and properly addressed as follows:

Townes B. Johnson, III, Esq.
Townes B. Johnson, III, LLC
P. O. Box 9246
Greenville, SC 29604

Attorney for Appellant

RECEIVED
SEP 24 2018
SC Court of Appeals



Laura Kirwan
Legal Assistant to Christopher R. Antley
Devlin & Parkinson, P.A.
P. O. Box 10387
Greenville, SC 29603