

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

Civil Action No. 2010-CP-07-04146
Appellate Case No. 2018-002188

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SC Court of Appeals

Ron Orlosky in his capacity as Personal Representative
of the Estate of Debora L. Orlosky, and in his capacity as
Trustee of the Debora Laura Orlosky Revocable Trust,

Respondent,

v.

The Law Office of Jay A. Mullinax, LLC,

Appellant.

RESPONDENT'S MEMORANDUM ON APPEALABILITY

COMES NOW, the Respondent, who submits this Memorandum in response to correspondence from the Clerk of the South Carolina Court of Appeals dated December 20, 2018, requesting he address the issue of appealability of the November 15, 2018 Order of the Honorable Judge Marvin H. Dukes, III, Master-in-Equity for Beaufort County.

The November 15, 2018 Order

The Appellant Law Firm has appealed the Order, which included a number of findings. First, Judge Dukes found that the new law firm owned and operated by Jay A. Mullinax, Esquire, (registered as Estate Planning Firm of Hilton Head, LLC) is an amalgamation of the Appellant Law Firm, previously owned and operated by Mr. Mullinax and that it was created for the express and deliberate purpose of avoiding the Appellant Law Firm's lawful debt to the Respondent, a former client. As a result of his finding of amalgamation, Judge Dukes ordered

that Estate Planning Firm of Hilton Head, LLC, is obligated to pay the debts of Appellant Law Firm. Second, as a corollary to that determination, Judge Dukes also found that it was appropriate to appoint a receiver for both law firms. He afforded the Appellant Law Firm and Mr. Mullinax forty-five days to reach a settlement with the Respondent, holding the actual appointment of a receiver in abeyance. Third, Judge Dukes found that the Appellant Law Firm and Mr. Mullinax acting as its counsel in civil contempt for repeatedly failing to comply with his orders. To that end, he ordered payment of the Respondent's attorneys' fees and costs to purge the contempt. Finally, Judge Dukes found Mr. Mullinax, personally, in criminal contempt of court for willful defiance of his orders. He held the determination of the sanction against Mr. Mullinax in abeyance pending his compliance with other terms of the November 15 Order, which included production of certain documents.

Appealability Generally

Rule 201, SCACR, provides that an appeal "may be taken, as provided by law, from any final judgment, appealable order or decision." Accordingly, a case may only be appealed if it is taken from a *final judgment*, unless some exception (developed in case law, court rules, or statute) applies. "Whether based on statute or case law, the overarching point remains—absent the presence of an exception to the final judgment rule, appealability is determined by a final judgment and an aggrieved party. See also Rule 201, SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order[,], or decision. . . . Only a party aggrieved by an order, judgment, sentence[,], or decision may appeal.")" State v. Looper, 421 S.C. 384, 390, 807 S.E.2d 203, 206 (2017).

Because of this "final judgment" rule, interlocutory appeals generally are not proper. "South Carolina case law has established what constitutes an interlocutory appeal. 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." Mid-State Distribs. v. Century Imps., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) (citing Adickes v. Allison & Bratton, 21 S.C. 245 (1884)). If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment. Id. (citing Good v. Hartford Accident and Indemnity Co., 201 S.C. 32, 21 S.E.2d 209 (1942)). "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been

determined." Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010).

The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. §14-3-330 (1976 & Supp. 2005). Absent a specialized statute, an order must fall into one of several categories set forth in § 14-3-330 in order to be immediately appealable. Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 4, 630 S.E.2d 464, 466 (2006). §14-3-330 provides for appellate review of the following:

(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;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

An appeal from an interlocutory order will not lie before final judgment unless it is one "involving the merits," or "affecting a substantial right." Wallace v. Interamerican Tr. Co., 246 S.C. 563, 568, 144 S.E.2d 813, 816 (1965). The court's definition of "involving the merits" has been questioned over the years. "Today we have defined an order which 'involves the merits,' as an order which 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense. . .'" Mid-State Distribs. v. Century Imps., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (quoting Jefferson v. Gene's Used Cars, Inc., 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988); Knowles v. Standard Savings & Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979)).

Based on the foregoing, the November 15 Order entered by Judge Dukes is immediately appealable.

Amalgamation

The portion of the November 15, 2018, Order finding that Estate Planning Firm of Hilton Head, LLC, is an amalgamation of the Appellant Law Firm, and is therefore subject to collection of the Respondent's lawful judgment is immediately appealable. This should be considered a final judgment in a law case involving the merits. The judge's determination that Mr. Mullinax's new law firm is an amalgamation of the judgment debtor finally determines a substantial matter of the cause of action.

As analyzed under the case law above, the decision of Judge Dukes on this matter disposes of the whole subject matter of the action, "leaving nothing to be done but to enforce by execution what has been determined." Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env'tl. Control, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010). There are several cases in which appellate courts did not dismiss the appeal as interlocutory and instead ruled on the amalgamation issue at hand. See, e.g., Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986) (affirming the trial court's denial of directed verdict motion based on amalgamation).

Appointment of a Receiver

The decision of Judge Dukes to appoint a receiver is an interlocutory order that is expressly appealable under the specific exception found in paragraph (4) of S.C. Code Ann. §14-3-330. Although a receiver has not yet actually been appointed, the judge has "granted ... the appointment of a receiver" as anticipated by the statute.

Contempt Orders

Both the civil and criminal contempt findings of Judge Dukes in the November 15 Order are immediately appealable. A contempt order is a final order that is immediately appealable. Hooper v. Rockwell, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999). In Jarrell v. Petoseed Co., 331 S.C. 207, 500 S.E.2d 793 (Ct. App. 1998), the Court of Appeals held that the trial court's finding that a seller was liable for civil compensatory contempt was immediately appealable even though damages were undetermined and fraud claim had not been decided. ("[The

contempt] order involves the merits and determines a substantial matter forming the underlying cause of action. [Appellant's] issues, therefore, are appealable." Citing, S.C. Code Ann. § 14-3-330(1) (1976); Peterkin v. Brigman 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995); Nauful v. Milligan, 258 S.C. 139, 143, 187 S.E.2d 511, 513 (1972).)

Discovery Orders

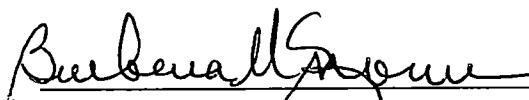
Whether the portions of the November 15 Order requiring the Appellant's counsel to produce certain records of Estate Planning Firm of Hilton Head, LLC, as an amalgamation of the Appellant Law Firm are immediately appealable is not relevant because Mr. Mullinax has complied with those directives, rendering any appeal thereof moot. Rule 69, SCRCP, and S.C. Code Sections 15-39-10 through 15-39-150 "bring[] to the assistance of a judgment creditor the right to obtain discovery under Rules 26 through 37" of the South Carolina Rules of Civil Procedure. (See, Note to Rule 69, SCRCP.) Judge Dukes's production orders are discovery orders which are ordinarily interlocutory and not subject to immediate appeal. See, Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008). ("[D]iscovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right.") See also, Ex parte Whetstone, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) ("An order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code Ann. § 14-3-330 (1976).") (citing Patterson v. Specter Broadcasting, 287 S.C. 249, 335 S.E.2d 803 (1985); Lowndes Products, Inc. v. Brower, 262 S.C. 431, 205 S.E.2d 184 (1974)).

Regardless of whether the discovery portions of the Order are immediately appealable, the issue is moot because Mr. Mullinax has complied by producing the required documents.

Conclusion

Based on the foregoing, the Respondent requests that the Court of Appeals resume the briefing schedule in this matter and proceed expeditiously with the Appellant's appeal of those portions of the Order that are not moot so that the Respondent may move forward with the collection of his lawful judgment and receive the compensation that is due for fees and costs incurred as a result of the contempt of court of the Appellant Law Firm and its counsel.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
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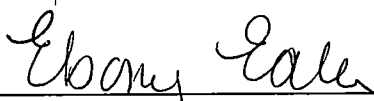
Appellant.

CERTIFICATE OF SERVICE

I certify that I have served Respondent's Memorandum of Appealability Counsel for Appellant by depositing copies of it in the United States Mail, postage prepaid, on January 2, 2019, addressed as follows:

Jay A. Mullinax, Esquire
2 Park Lane, Suite 303
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January 2, 2019


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January 2, 2019

File No.: 20172832.000

The Honorable V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Ron Orlosky v. Law Office of Jay A. Mullinax
Appellate Case No. 2018-002188

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Dear Ms. Allen:

Enclosed please find the original and six copies of Respondent's Memorandum on Appealability in the above-referenced matter that you requested by letter dated December 20, 2018. Also enclosed is our certificate of service on counsel for the Appellant.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

CLAWSON and STAUBES, LLC



Barbara M. Seymour

BMS/

Enclosures

cc(w/encl): Jay A. Mullinax, Esquire
Counsel for Appellant

ec(w/encl): John R.C. Bowen, Esquire
Stephen A. Spitz, Esquire
Counsel for Respondent

Ron Orlosky
Respondent