

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
CIRCUIT COURT

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-28-1087

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MAY 15 2019

SC Court of Appeals

Dottie R. Bell.....Appellant,

v.

John C. BentleyRespondent.

**MEMORANDUM ADDRESSING THE ISSUE OF APPEALABILITY PER THE
REQUEST OF THIS COURT**

Comes now, Appellant in the above-styled action, and files this memorandum addressing the issue of appealability per the request of this Court. It is the position of the Appellant that the Circuit Court Judge’s denial of Plaintiff’s Motion to Substitute a Personal Representative or Real Party of Interest (“Motion to Substitute”) and subsequent denial of their Motion to Reconsider the Order is immediately appealable.

STATEMENT OF FACTS

This appeal arises out of Judge Hood’s denial of Appellants’ Motion to Substitute. Plaintiff filed their original action on December 13, 2016 after Plaintiff suffered serious injuries as a result of the negligence of Defendant. Plaintiffs were unable to locate Defendant, thus served him by publication on February 17, 2017, and an affidavit of publication was filed with the Court

on April 21, 2017. On January 25, 2018, Plaintiff was informed in an email by counsel for Defendant that she had been informed Defendant was deceased. Defendant's counsel had no specific information regarding the death of Defendant. In order to confirm Defendant had in fact passed away, Plaintiff's counsel undertook many steps to try and first confirm Defendant's death and then have a Personal Representative appointed. The steps taken are as follows:

January 29, 2018: Plaintiff emails the Probate Court and determines no estate has been established.

January 31, 2018: Plaintiff sends DHEC a request for a statement of death.

February 1-8, 2018: Plaintiff compiles list of all funeral homes in the area.

February 9, 2018: Plaintiff emails 9 funeral homes requesting any information regarding Mr. Bentley. No funeral homes in Fairfield County have any information regarding Mr. Bentley.

February 19, 2018: Plaintiff sends discovery request to Defense counsel asking them to disclose specific information related to the death of Defendant. This request went unheeded.

March 7, 2018: Plaintiff drafts FOIA Request to Lee County requesting any information regarding Mr. Bentley.

April 17, 2018: Plaintiff sends another FOIA Request to Lee County and request to DHEC requesting certificate of death.

April 17, 2018: Plaintiff receives email from Coroner of Lee County that Mr. Bentley was in fact deceased.

April 25, 2018: Plaintiff sends letter to Defense counsel requesting they answer Plaintiff's discovery request sent on February 19, 2018.

May 16, 2018: Plaintiff sends another follow-up correspondence to DHEC requesting a statement of death. **(Please note, the Probate Court will not consider any petition to appoint a Special Administrator without confirmation from DHEC.)**

June 12, 2018: Plaintiff receives a Statement of Death from DHEC confirming the death of Defendant (DHEC apparently did not have a Certificate of Death).

July 20, 2018: Plaintiff sends a Proposed Order naming Bryan Caskey Special Administrator.

August 14, 2018: Judge Branham signs proposed Order naming Bryan Caskey Special Administrator.

August 16, 2018: Plaintiff sends correspondence informing Bryan Caskey of appointment.

September 10, 2018: Plaintiff files Motion to Substitute.

That Motion was heard before Judge Benjamin on October 15, 2018. At that time, Bryan Caskey had not yet been served the Summons and Complaint in the matter, although he had been informed of appointment. Judge Benjamin made the determination that Plaintiff should be granted leave to serve Mr. Caskey. Then, Mr. Caskey could be properly substituted as a party per S.C.R.C.P. Rule 17.

On October 19, 2018, Plaintiff served Special Administrator Bryan Caskey and he signed Acceptance of Service. Plaintiff refiled their Motion to Substitute, and the Motion was heard in front of Judge Hood on February 13, 2019. At that hearing, opposing counsel argued S.C.R.C.P. Rule 25 as an entirely new defense which had not been argued at the October 15, 2018 hearing. Defendant argued that Substitution of Bryan Caskey as Real Party of Interest was not made within a reasonable time. Judge Hood issued an Order on February 14, 2019 denying Plaintiff's Motion to Substitute. Plaintiff filed a Motion to Reconsider, which Judge Hood also denied. This Appeal follows.

ARGUMENT

I. THIS INTERLOCUTORY ORDER IS IMMEDIATELY APPEALABLE AS IT FALLS WITHIN SECTION 14-3-330.

It appears that neither this Court nor the South Carolina Supreme Court has ever addressed whether an order granting or denying a motion to substitute parties is immediately appealable. (see Neeltec Enters. Inc. v. Long (S.C. App., 2010) dismissing an appeal but noting in Footnote 2 that “a motion to substitute may be immediately appealable if it falls under Section 14-3-330(1) or

(2)"). This Court may review any intermediate order which involves the merits of an action. S.C. Code Ann. §14-3-330(1). The Courts have defined this mean that an order involving the merits "must finally determine some substantial matter forming the whole or a part of some cause of action or defense in the case in which the order is entitled." Duncan v. Gov't Employees Ins. Co., 331 S.C. 484, 485; 449 S.E.2d 580, 580 (1994). An interlocutory order may also be appealed if it "affect[s] a substantial right made in an action when such an order in effect determines the action and prevents judgment from which an appeal might be taken or discontinues the action." (see S.C. Code Ann. §14-3-330(2)).

The trial Court's decision to deny the Motion to Substitute absolutely involves the merits of this action. By determining that a personal representative or real party of interest could not be substituted, there is a substantial risk that Plaintiff may not be able to recover, as now there is essentially no party against whom Plaintiff can bring a lawsuit. There is no situation more analogous to a final determination of some substantial matter than the possibility that Plaintiff's right to bring an action for substantial loss she suffered may fail because there is no party for her to sue.

The trial Court's decision to deny the Motion to Substitute also meets the standard laid out by S.C. Code Ann. §14-3-330(2). This Order effectively determines the action as there is no real party against whom Plaintiff can bring suit. Without a real party of interest to sue, the action is essentially discontinued. Therefore, this interlocutory Order is immediately appealable.

II. S.C.R.C.P. RULE 25(e) ALLOWS THIS COURT TO SUBSTITUTE A REAL PARTY OF INTEREST PENDING APPEAL.

Rule 25(e) of the South Carolina Rules of Civil Procedure states, "Substitution of parties under the provision of [Rule 25] may be made...pending appeal, by the appellate court." Should this Court find that this interlocutory appeal is proper under the Rules, this Court could also make

the substitution of parties sought by Plaintiff. However, should this Court find that there are no exceptions that make this interlocutory appeal proper, this Court could make a substitution post final judgment of the trial Court.

CONCLUSION

Based upon the foregoing reasons, Plaintiff has taken all proper steps in the filing of their Motion to Substitute and the interlocutory Order denying their Motion was improper. This current interlocutory Motion is proper for this Court, and Plaintiff prays this Court hear it.

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