THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAAL FROM DORCHESTER COUNTY
George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2019-002081
Case No. 2018-CP-18-1960

Carl Michael Funny, ... Respondent,

v.

Waffle House, Inc. and Christopher Heithaus, ... Appellants.

RETURN TO APPELLANT'S PETITION FOR REHEARING

Appellants Waffle House, Inc. and Christopher Heithaus have filed a petition for rehearing of this Court's dismissal of their interlocutory appeal of a discovery order. Pursuant to SCACR 221(a) and 240(e), Respondent submits this return to Appellants' petition for rehearing at the Court's request.

On December 23, 2019, Appellants filed their Notice of Appeal of the trial court's Order Granting Plaintiff's Motion to Compel Discovery and subsequent Order Denying Appellants' Motion to Alter or Amend. On January 6, 2020, this Court correctly identified Appellants' appeal as interlocutory because it arose out of a discovery order and this appeal was appropriately dismissed. Now, as made clear in footnote 1 of their petition for rehearing, Appellants seek to

backdoor their discovery appeal in through an appeal of the trial court's award of costs and fees pursuant to SCRCP 37(a)(4). The discovery order and award of costs and fees are interlocutory and not appealable. Appellants have dragged out this discovery issue for a full year and Respondent respectfully requests that this Court finally put an end to Appellants' dilatory tactics.

BACKGROUND

Respondent served Appellants' counsel with initial discovery requests on December 5, 2018. After Appellants missed two discovery deadlines, including extensions they requested, and Respondent's counsel sending multiple reminder emails, Respondent finally filed a motion to compel. Appellants waited until the afternoon before the hearing on that motion to produce partial discovery responses. On May 31, 2019, the trial court issued an Order compelling complete discovery responses, finding that Appellants waived objections, and awarding Plaintiff's costs and fees in the amount of $784.74 pursuant to SCRCP 37(a).

Appellants proceeded to file two motions to alter, amend, or reconsider challenging the trial court's order compelling complete discovery and the award of costs and fees. The trial court denied both of those motions but has not, to date, issued any final order that ends the underlying action.

After this Court properly dismissed their interlocutory appeal, Appellants are now petitioning this Court to rehear their appeal of the trial court's three orders compelling discovery and the initial order awarding costs and fees.

ANALYSIS

In footnote 1 of their memorandum, Appellants tip their hand that they seek to back-door an interlocutory appeal of the trial court's discovery order in suggesting "other aspects of the orders on appeal may also be reviewed…in the interests of judicial economy." In actuality, if Appellants'

petition for rehearing is granted it will result in far greater wastes of judicial resources, not to mention litigants' resources, and vitiate attempts by trial courts to enforce discovery rules. Further, the relevant case law is clear that this issue is not appealable and Appellants' summary of federal case law is flatly wrong.

I. Allowing Appellants to proceed with their appeal will gut Rule 37 and attempts by trial courts to enforce compliance with discovery rules.

South Carolina Rule of Civil Procedure 37(a) governs motions to compel discovery when a party does not answer discovery requests. Subsection (a)(4) provides that if a motion to compel discovery is granted:

> "the court shall, after opportunity for hearing, require the party … whose conduct necessitated the motion … to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

This rule is necessary because, without it, litigants would be able to unjustifiably refuse to cooperate in discovery without consequence. At least one judge in South Carolina has lamented the discovery disputes the trial courts are confronted with:

> "In my 22 years as a judge I have grown to truly loathe discovery motion hearings. Both sides are guilty, as are large and small firms. Computers have made it simple to cut and paste stock objections. The result is a non-jury docket cluttered with motions to compel, a large number of which are settled last-minute. However, a number of them do not, and judges have to sift through some of the most tedious objections you can imagine. It's the only time I ever seriously consider retirement…"

(Ninth Judicial Circuit Chief Administrative Judge Roger Young's July 2, 2018 letter to the Charleston County Bar). Both this Chief Administrative Judge, and other judges[1], have instructed parties moving to compel discovery to bring to the hearing affidavits, briefs, and proposed orders

[1] See, also, Judge Edgar W. Dickson's February 5, 2019 "Notice Regarding All Motions to Compel" instructing parties to request costs and fees at such hearings.

"granting the relief and leaving a blank for the amount of fees and costs to be awarded." (August 29, 2019 Memorandum to Attorneys and Parties with Discovery Motions).

Here, the trial court found Appellants were not justified in missing a discovery deadline, requesting an extension, missing that extension, then ignoring Plaintiff's counsel's offer of another extension and repeated emails asking for discovery, and then waiting until the day before the hearing to produce partial discovery. As a result of this finding, the trial court found that an award of costs of $34.74 and attorney fees of $750.00 was reasonable and required under SCRCP 37(a)(4).

Although the subject motion to compel hearing on April 11, 2019 predated Judge Young's and similar memoranda by a few months, Plaintiff's counsel's request for costs and fees for Appellants' unjustified conduct was in line with the trial courts' attempts to reign in discovery abuses. Allowing Appellants to now appeal this discovery and sanctions order will have the exact opposite effect by rewarding unjustified conduct with a year long delay of the most basic discovery issue, and thus a year long delay in the administration of justice. It would also set a terrible precedent that will drag the Court of Appeals into a morass of discovery disputes and minor remedial sanctions.

II. Civil sanctions or contempt orders against parties are not appealable until the underlying action has a final order.

Appellants are incorrect and incomplete in their summary of the federal law on appealability of contempt orders.

Federal case law has clearly laid out the distinction between criminal contempt orders, civil contempt orders against non-parties, and civil contempt orders against parties: the first two are immediately appealable, but the last is not. *See, e.g.*, *Hicks v. Feiock*, 485 U.S. 624, 631-35 (1988) (distinguishing civil from criminal contempt orders).

Whether a sanction or contempt order is civil or criminal hinges upon the "character and purpose" of the order. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). A contempt order is criminal if the relief provided is punitive. *Hicks*, 485 U.S. at 632. If the relief is financial, it is punitive when it is paid to the court but it is remedial when it is paid to the complainant. *Id.* Criminal contempt orders are immediately appealable because of constitutional protections. *Id.* (Citing *Gompers*, 221 U.S. at 244; *Michaelson v. United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U.S. 42, 66 (1924)).

Clearly, here, the trial court's order that Appellants pay $784.74 to Plaintiff for costs and fees pursuant to SCRCP 37(a) is not punitive in nature under the Supreme Court's framework. Instead, it is a civil contempt order.

Turning to civil contempt orders, "[t]he law is substantially settled that neither a party nor a nonparty to litigation may bring an immediate appeal of a discovery order… A nonparty witness may refuse to comply with a discovery order, be held in contempt, and then appeal the contempt order, which is considered a 'final decision' under § 1291… **A party, however, may appeal only an order of criminal contempt before final judgment, not one of civil contempt**… It follows that a party may not appeal a sanction order other than criminal contempt before final judgment." *Appeal of Licht & Semonoff*, 796 F.2d 564, 568 (1st Cir. 1986) (numerous citations omitted) (emphasis added). Even where the party is imprisoned for civil contempt his constitutional rights, such as right to immediate appeal and right to counsel, are not be triggered. *Price v. Turner*, 387 S.C. 142 (2010); *Hicks* at 632-33.

Courts do not permit parties to a pending action to immediately appeal a civil contempt order for two reasons: (1) they will have the opportunity to appeal a civil contempt order after the case's final decision, and (2) the civil contempt order is closely related to the underlying action.

IBM Corp. v. United States, 493 F.2d 112, 114-15 (2d Cir. 1974). Plaintiff would add to that analysis the above arguments regarding judicial efficiency and not permitting dilatory conduct necessitating the sanction to be rewarded with further delay.

Here, the trial court's award of reasonable costs and fees against Appellants is a civil contempt order against a party to the litigation. Therefore, it is not appealable under the federal case law that Appellants purport to rely upon.

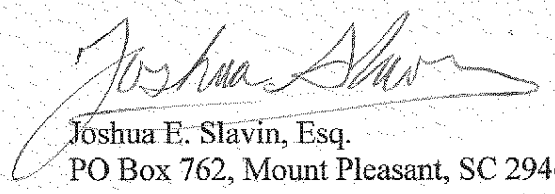
The federal cases Appellants cite are, at best, inapposite. In *Lazorko v. Penn. Hospital*, the District Court had dismissed or remanded all claims before it except for the issue of sanctions for frivolous allegations; because the underlying action was no longer before the trial court the sanctions order against the party litigant was a considered final order. 237 F.3d 242, 247. Even then, the appellate court declined review because the appellant initially filed its appeal prematurely, noting "Rule 11 sanctions awards are interlocutory in nature…" *Id* at 248. Similarly, *Jaffe v. Sundowner Properties, Inc.*, 808 F.2d 1425,[2] is inapposite because the *pro se* litigant's underlying suit was dismissed, making the award of attorney's fees final once the amount of fees was set by the district court. Neither case stands for the proposition that an interlocutory award of costs and attorney's fees is immediately appealable when the underlying action is still pending.

[2] This is the correct citation to this case as Appellants' citation misspells the party's name and identifies the wrong reporter.

CONCLUSION

For the foregoing reasons, the trial court's discovery order is not immediately appealable and this Court was correct in January 6, 2020 order dismissing Appellant's appeal. Appellant's petition for rehearing should be dismissed.

Respectfully,
THE LAW OFFICES OF JOSHUA E. SLAVIN, LLC



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May 15, 2020
Mount Pleasant, SC

CERTIFICATE OF SERVICE

The undersigned, Joshua E. Slavin, counsel for the Respondents, hereby certifies that service of the Return was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the below listed address on May 15, 2020:

Andrew Lindemann
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May 15, 2020

Via Fax only: 803-734-1839
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals

Re: Carl M. Funny v. Waffle House, Inc.
Appellate Case No. 2019-002081

Dear Ms. Kitchings:

Please find enclosed for filing **Respondent's Return** to Appellants' Petition for Rehearing in the above-referenced matter. The Court requested Respondent to file a return and granted an extension to May 1, 2020, which was subsequently extended by the Supreme Court's Covid-19 Order extending deadlines for Appellate filings by twenty days. Pursuant to subsection (c)(4) of that order, Respondent will not mail a paper copy unless instructed otherwise.

Appellants' counsel is served with this filing by mail.

Respectfully,
The Law Offices of Joshua E. Slavin, LLC

/s/ Joshua Slavin

Enclosures
cc: Andrew Lindemann, Esq.