

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Aug 03 2020

S.C. SUPREME COURT

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

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

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Jul 31 2020

SC Court of Appeals

Carl Michael Funny, Respondent,

v.

Waffle House, Inc. and Christopher Heithaus, Petitioners.

PETITION FOR WRIT OF CERTIORARI

ANDREW F. LINDEMANN
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Counsel for Petitioners

TABLE OF CONTENTS

Certificate of Counsel	1
Questions Presented	1
Statement of the Case.....	2
Arguments.....	3
Conclusion	6

CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on July 1, 2020.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in summarily dismissing the Petitioners' appeal for lack of appellate jurisdiction? Is an order requiring payment of a set amount of monetary sanctions, whether by the contempt power or by some other source of judicial authority, an immediately appealable order?
- II. Does the Court of Appeals' ruling on appellate jurisdiction violate equal protection? Is there a rational basis to draw a distinction between civil contempt monetary sanctions and non-contempt monetary sanctions where one form of sanctions is immediately appealable and the other is not?

STATEMENT OF THE CASE

This is an appeal from an order of the Circuit Court awarding sanctions against the Petitioners Waffle House, Inc. and Christopher Heithaus. The order set the specific sum for the sanctions and did not delay the payment until final judgment. The Petitioners appealed that order to the Court of Appeals.

Before the Petitioners were afforded the opportunity to file their initial brief and explain the issues to be raised on appeal relative to the sanctions award, the Court of Appeals, acting through a single judge, dismissed the Petitioners' appeal as interlocutory. The dismissal was *sua sponte*. The Respondent never moved for a dismissal of the appeal. The Court of Appeals likewise did not raise an issue of appealability and request briefing. Instead, without first affording basic due process, the appeal was dismissed. The Court of Appeals determined that "[t]his appeal arises out of an order of the circuit court granting the respondent's motion to compel discovery" and that "an order compelling discovery may not be appealed." Yet, in actuality, the order on appeal also awarded a set sum in monetary sanctions subject to immediate payment. In its order, the Court of Appeals did not consider that aspect of the order on appeal, nor address the appealability of that sanctions award.

The Petitioners filed a petition for rehearing, which was summarily denied by order issued on July 1, 2020.

ARGUMENTS

By Order filed January 6, 2020, the Court of Appeals *sua sponte* dismissed the Petitioners' appeal as interlocutory. The Court, acting through one judge, determined that "[t]his appeal arises out of an order of the circuit court granting the respondent's motion to compel discovery" and that "an order compelling discovery may not be appealed." The Petitioners sought rehearing which was summarily denied. The Petitioners submit that they present an order that is immediately appealable and ask this Court to grant a writ of certiorari and to remand with directions that the Court of Appeals allow briefing and adjudication of the appeal on its merits.

The Court of Appeals failed to recognize the precise nature of the orders on appeal. The Order filed May 31, 2019, while captioned as an "Order Granting Plaintiff's Motion to Compel Discovery," also grants the Respondent's motion for sanctions. The order on appeal awards sanctions in the form of attorney's fees and costs against the Petitioners. The Appellants have appealed that award of sanctions, which is subject to an immediate appeal.

According to this Court's precedent, an order denying or compelling pretrial discovery is generally not directly appealable "because it leaves some further act to be done by the court before the rights of the parties in an enforcement proceeding are determined." *Ex Parte Wilson*, 367 S.C. 7, 625 S.E.2d 205, 208 (2005). However, "a writ of error will lie ... to a final judgment or an award in the nature of a final judgment." *Good v. Hartford Accident Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942). This Court has held that a contempt order, for example, is "a final order that is immediately appealable." *Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358, 364 (1999). This is because "[a] civil compensatory fine is analogous to a tort judgment for damages caused by wrongful conduct." *Jarrell v. Petoseed Co.*, 331 S.C. 207, 210, 500 S.E.2d

793, 794 (Ct. App. 1998). Accordingly, contempt orders involve the merits and are deemed to be immediately appealable. In fact, in its order in this appeal, the Court of Appeals cited *Tucker v. Honda of South Carolina, Inc.*, 354 S.C. 574, 582 S.E.2d 405 (2003), for holding that “a party must refuse to comply with a discovery order and be held in contempt before the decision becomes appealable.” 582 S.E.2d at 406.

There are no reported South Carolina decisions that address whether a non-contempt monetary sanction is an immediately appealable final order. However, like a contempt order, an order directing that a specific sum of monetary sanctions be paid should be deemed a final order subject to immediate appeal. The sanctions, like a civil compensatory contempt order, are designed to remedy past noncompliance. *See, Jarrell v. Petoseed Co.*, 331 S.C. 207, 210, 500 S.E.2d 793, 794 (Ct. App. 1998) (“[c]ivil compensatory contempt's purpose ... is designed to remedy past noncompliance”). Importantly, there is no further act to be determined by the court to determine the rights of the parties, as in this case, where the monetary sanctions have been established. The Circuit Court did not delay the imposition of the sanction until final judgment.

Furthermore, there is no discernible or reasonable basis to draw a distinction between civil contempt monetary sanctions and non-contempt monetary sanctions where one form of sanctions is immediately appealable and the other is not. The appellate courts and jurisdictional statutes are subject to the dictates of equal protection, just as other governmental actors and statutory law are. *See, In the Interest of Shaw*, 274 S.C. 534, 265 S.E.2d 522 (1980) (addressing equal protection challenge to jurisdictional statute). As the South Carolina Constitution mandates, no person shall be denied the equal protection of the laws. S.C. Const. art. I, § 3. “To satisfy the equal protection clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under

similar circumstances, and (3) the classification must rest on some rational basis.” *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462, 469 (2004). Therefore, an order requiring a set amount of monetary sanctions, whether by the contempt power or by some other source of judicial authority, should be deemed an appealable order. There is no rational basis for distinguishing between the two orders where a final monetary amount is set by the lower court.

At the very least, the issue raised by the Petitioners should proceed to full briefing and adjudication given the novel issues raised. The appeal should not have been summarily dismissed *sua sponte*. The Petitioners request that a writ of certiorari be issued so that the dismissal order entered *sua sponte* may be vacated and this appeal be allowed to proceed to the briefing stage, including, if necessary, further briefing and full analysis of the appealability issues which are of novel impression under South Carolina law. Ultimately, the order granting monetary sanctions, where the amount of the sanctions is conclusively determined, should be deemed a final order that is immediately appealable so that equal protection of the laws is satisfied.

CONCLUSION

Based on the foregoing discussion, the Petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES P.A.

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CERTIFICATE OF SERVICE

Pursuant to Section (g)(3) of the Supreme Court’s Order Re: Operation of the Trial Courts During the Coronavirus Emergency (as amended May 29, 2020), the undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Petitioners, does hereby certify that service of the **Petition for Writ of Certiorari** was made upon all counsel of record and the Clerk of the South Carolina Court of Appeals by email only this the 31st day of July 2020:

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

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The Law Offices of Joshua E. Slavin, LLC
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s/ Andrew F. Lindemann



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Via Email Only

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Email: supctfilings@sccourts.org

RE: Carl Michael Funny v. Waffle House, Inc. and Christopher Heithaus
Court of Appeals Appellate Case Number: 2019-002081
Civil Action Number: 2018-CP-18-1960
Our File Number: 326.20090

Dear Mr. Shearouse:

Please find enclosed for filing the **Petition for Writ of Certiorari** in the above referenced matter. Consistent with this Court's Order Regarding Operation of the Appellate Courts During the Coronavirus Emergency, I am not filing an Appendix but certainly will do so upon order of the Court.

By copy of this letter, I am serving copies on all counsel of record by email only, and am providing a copy of the Petition to the Clerk of the Court of Appeals. The check for the \$250.00 filing fee will be sent under separate cover.

Thank you for your assistance in this matter. If you have any questions, please advise.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

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The Honorable Daniel E. Shearouse
July 31, 2020
Page Two

cc: (w/Enclosure)

Via Email Only

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