

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JAN 21 2020

SC Court of Appeals

APPEAL 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.

**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

The Appellants Waffle House, Inc. and Christopher Heithaus have petitioned this Court for a rehearing of the recent dismissal of this appeal. By Order filed January 6, 2020, the Court *sua sponte* dismissed the Appellants' appeal as interlocutory. The Court 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 Appellants respectfully submit that the Court’s Order is in error and the Order dismissing the appeal should be vacated or reversed on rehearing.

The Court has overlooked or misapprehended 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 Appellants in the amount of \$784.74. The Appellants have appealed that award of sanctions, which is subject to an immediate appeal.

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). 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 cites *Tucker v. Honda of South Carolina, Inc.*, 354 S.C. 574, 582 S.E.2d 405, 406 (2003), for holding that “a party must refuse to comply with a discovery order and be held in contempt before the decision becomes appealable.”

There are no reported South Carolina decisions that address whether a non-contempt monetary sanction is an immediately appealable final order. However, the federal courts generally treat decisions imposing monetary sanctions as final once the court decides the amount of the sanctions. For example, in *Lazorko v. Penn. Hospital*, 237 F.3d 242 (3d Cir. 2000), the Third Circuit ruled that “[a]n award of sanctions is not a final order, and thus not appealable, until the district court determines the amount of the sanction.” 237 F.3d at 248. *See also, Jafee v. Sundowner Properties, Inc.*, 808 F.3d 1425, 1426 (11th Cir. 1987) (“[b]ecause the amount of attorney's fees has not yet been fixed, the order appealed from is not a final judgment. In a case apparently of first impression in this Circuit, we hold that until the amount of attorney's fees has been determined, a Rule 37(d) sanction order is not final for purposes of appeal under 28 U.S.C. § 1291”).

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. There is no reasonable basis, therefore, 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. Accordingly, the order granting monetary sanctions, where the amount of the sanctions is conclusively determined, should be deemed a final order that is immediately appealable.¹

The Court is respectfully requested on rehearing to vacate the dismissal order entered *sua sponte* and to allow this appeal to proceed to the briefing stage, including further briefing and full analysis of the appealability issues which do appear to be of novel impression under South Carolina law.

¹ Additionally, the other aspects of the orders on appeal may also be reviewed within this Court's discretion particularly in the interests of judicial economy. This Court has recognized that it "may review an interlocutory order when the order is coupled with an appealable issue." *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 670 S.E.2d 680, 688, n.14 (Ct. App. 2008). The Supreme Court has likewise agreed. For example, in *Edge v. State Farm Mut. Automobile Ins. Co.*, 366 S.C. 511, 623 S.E.2d 387 (2005), the Supreme Court acknowledged that "[a]n order that is not directly appealable may be considered if there is an appealable issue before the court." *Id.*, citing *Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979).

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: 

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Counsel for Appellants

January 21, 2020

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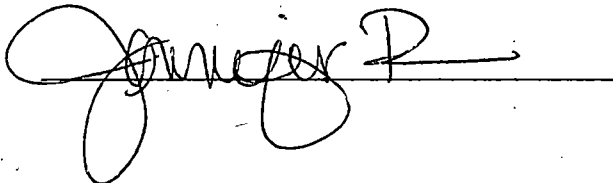
Waffle House, Inc. and Christopher Heithaus,

Appellants.

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Appellants, does hereby certify that service of the **Petition for Rehearing and Memorandum in Support of Petition for Rehearing** was made upon Respondent's counsel by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 21st day of January 2020:

Joshua E. Slavin, Esquire
The Law Offices of Joshua E. Slavin, LLC
746 Wakendaw Boulevard
Mount Pleasant, South Carolina 29464





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Columbia, South Carolina 29260

January 21, 2020

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Carl Michael Funny v. Waffle House, Inc. and Christopher Heithaus
Appellate Case Number: 2019-002081
Civil Action Number: 2018-CP-18-1960
Claim Number: GL20170000996
Our File Number: 326.20090

Dear Ms. Kitchings:

Please find enclosed for filing the originals and seven copies each of the **Petition for Rehearing and Memorandum in Support of Petition for Rehearing** in the above referenced matter. Please find the originals and return a clocked-in copy of each document to me by way of my courier. I have also enclosed my firm's \$50.00 check for the filing fee.

By copy of this letter, I am serving copies on Respondent's counsel. If you have any questions, please advise.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures)

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