THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

James E. Chellis, Master-In-Equity

RECEIVED
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SC Court of Appeals

Appellate Case No. 2020-001127

1st Franklin Financial Corporation

Respondent,

v.

Roby A. Adams

Appellant.

OBJECTION TO MOTION TO DISMISS APPEAL

John R. Cantrell, Jr., SC Bar # 10309
Cantrell Legal, PC
Post Office Box 1276
Goose Creek, SC 29445-1276
(843) 797-2454
lawyer@comcast.net
Attorney for Appellant

On September 11, 2020, Respondent filed a Motion to Dismiss ("Motion") the pending appeal of an adverse partial summary judgment ruling in the lower court. Appellant hereby files this Objection responding to the Motion. Contrary to Respondent's assertions, Appellant believes that the partial summary judgment order is an immediately appealable order, for the reasons that follow. Respondent also asks the court to dismiss the appeal due to the failure of Appellant to order a transcript of the summary judgment hearing in the court below. However, Appellant has filed a motion asking the court of appeals for permission not to have to order that transcript, which motion is still pending before this court.

Appealability of Partial Summary Judgment Order

In Respondent's Factual Background section of its Motion, Respondent includes a lot of background information that is relevant only to the underlying case as a whole, and not to this appeal. Appellant will limit his arguments to matters which are relevant to this appeal.

In Respondent's argument section of its Motion in regards to the legal standard that applies to this appeal, Respondent correctly cites to Rule 201(a), SCACR and S.C. Code Sec. 14-3-330, and cases interpreting those authorities, but Appellant believes that Respondent has not correctly applied those authorities, as will become more apparent below.

Respondent claims that the partial summary judgment order being appealed is not a "final judgment" that can be appealed. Although the Order only granted partial summary judgment, as to some issues Appellant believes that it was a final order. Respondent claims that the Order did not grant Respondent summary judgment as to any of Appellant's counterclaims, but Appellant

disagrees with that statement. Reference to the Order itself, which was attached as Exhibit A to Respondent's Motion, reveals the following language on page 5 of the Order: "**II. 1st Franklin's Motion for Judgment as to Defendant's Counterclaims is Granted.**" On page 6 of the Order, the court rules that "**A. 1st Franklin is Entitled to Summary Judgment on Defendant's Claim that it Falsely Represented the Amount Owed by Defendant.**" Further, on page 7 of Order, the court states "[a]fter considering the hearing the arguments of counsel and the filings, including the deposition testimony submitted by Defendant's counsel, the court holds that 1st Franklin is entitled to summary judgment on Defendant's claim that Plaintiff falsely represented the amount owed by Defendant." On page 8 of the Order, the court states "[i]n three years of litigation Defendant has provided no evidence in the record upon which the court could find that 1st Franklin falsely represented the amount owed in a manner that could, even viewed in the light most favorable to defendant, be characterized as "fraudulent, deceptive, or misleading" or "unconscionable." *See* S.C. Code § 37-5-108(2)." Furthermore, on this issue of the false representation counterclaim, in the Conclusion paragraph on page 11 of the Order, the court states "Plaintiff's motion for summary judgment as to Defendant's counterclaims alleging that Plaintiff falsely represented the amount of the debt, relating to the Dorchester County Sheriff's Office serving Defendant's neighbor and alleging that 1st Franklin engaged in the unauthorized practice of law is also granted. Defendant is barred from presenting testimony or evidence at any future proceedings in this matter relating to the alleged false representation of the amount of the debt, service by the Dorchester County Sheriff's Office, or the alleged unauthorized practice of law." In light of this language, Appellant is at a loss to understand how Respondent can claim in

its Motion that "[t]he order did not grant 1st Franklin summary judgment as to any of Defendant's counterclaims." (Motion, p. 7, section B). It should also be noted that on page 9 of the Order that "[t]he court finds that the legislature did not intend to impose strict liability for the factors set forth in section 37-5-108(5). Rather, the legislature intended to provide the courts deference to determine, as a matter of law, whether certain actions constituted unconscionable conduct. Defendant's proposed interpretation of the statute whereby any violation of the factors set forth in section 37-5-108(5) gives rise to liability is in direct conflict with the actual language of the statute.," which holding is also at issue in this appeal. Respondent states on page 7 of the Motion that "[f]inal judgment has not been entered on *any* of Adams's counterclaims. The order is clearly interlocutory and is not immediately appealable." but this is a false dichotomy, since an interlocutory order may be immediately appealable under S.C. Code Sec. 14-3-330 (see Code section itself), which Respondent itself recognizes on page 6 of the Motion in the last paragraph on that page. Therefore, whether or not the Order is a final judgment is irrelevant to its appealability. Instead, the focus should be on whether the order is appealable under S.C. Code Sec. 14-3-330.

On page 8 of the Motion, Respondent claims that the Order does not involve the merits or affect a substantial right. However, this is incorrect. Respondent claims "[o]rders granting motions for partial summary judgment are not automatically appealable. *See Thornton v. S.C. Elec. & Gas Corp.,* 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011)." However, the *Thornton* case actually states on the page of the case pinpoint cited by Respondent "[g]enerally, orders granting partial summary judgment may be immediately appealable under either the

"involving the merits" or "substantial right" categories of section 143330(1) and (2)(c). *See Link v. Sch. Dist. of Pickens County,* 302 S.C. 1, 6, 393 S.E.2d 176, 17879 (1990) (holding an order granting partial summary judgment may be appealable under either category). To decide whether a particular summary judgment order fits into either subsection, however, the court must examine the order to determine if it meets the subsection's criteria for appealability." (*Thornton* at 306, Sec. B). Although in the class action T*hornton* case the Court of Appeals did find the summary judgment order there to be unappealable, somehow Respondent gets the general rule completely backwards in its Motion.

The *Link* case, which Respondent fails to cite at all in its Motion, in spite of it having been cited on the pinpoint cite page of the *Thornton* case establishing the general rule that partial summary judgment orders are immediately appealable, appears to be the main case to consider on the issue of whether or not the pending appeal is proper at this time. In *Link*, the appellant had summary judgment issued against him on his breach of contract claim, but he did not immediately attempt to appeal that order. On appeal, Mr. Link argued that he didn't have to appeal the summary judgment order immediately, since the circuit court judge didn't certify the order as a final order under Rule 54(b), SCRCP. However, the opposing party argued that Mr. Link was barred from appealing the summary judgment order at the end of the case, since it had to have been appealed immediately under S.C. Code Sec. 14-3-330(2). Ironically, the Court of Appeals found that both parties' arguments were wrong (*Link* at 3). Instead, the court found that "[w]hile we agree that the order granting summary judgment may be appealable under § 14-3-330(2)(c) because it has the effect of striking out a pleading, the order is also appealable under §

14-3-330(1) as "involving merits." *Nauful v. Milligan*, 258 S.C. 139, 187 S.E. (2d) 511 (1972); *Cf. Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E. (2d) 456 (1988) (an order "involves the merits" when it finally determines "some substantial matter forming the whole or a part of some cause of action or defense ..."). A summary judgment ruling, as well as a 12(b)(6) dismissal, fits within this *Jefferson* definition. Section 14-3-330(1) allows a party to wait until final judgment to appeal intermediate orders "necessarily affecting the judgment not before appealed from." We have long ago held that the phrase "necessarily affecting the judgment" has the equivalent meaning as the phrase "involving the merits," and that the legislature meant to use these phrases interchangeably. *Blakely & Copeland v. Frazier*, 11 S.C. 122 (1878). Hence, Link was entitled here, under § 14-3-330(1), to wait until final judgment to appeal the summary judgment ruling against him." (*Link* at 6). The rule, therefore, from *Link* is that it is generally proper to appeal a partial summary judgment order that strikes out part of a pleading either at the time the order is issued, as in this case, or after final judgment. Like Mr. Link, who lost his breach of contract action on summary judgment, Mr. Adams lost his his counterclaim alleging that 1st Franklin falsely represented the amount of the debt that was owed by Mr. Adams to 1st Franklin (see portions of Order cited on page 3 above). Indeed the lower court's order even goes so far as to prohibit Mr. Adams from introducing any testimony or evidence of the alleged false representation at the trial of this case (see Conclusion section of Order), so if Mr. Adams cannot pursue this appeal at this time, then he will be prevented by the Order from arguing this portion of his counterclaims at trial. Respondent claims that this appeal should be dismissed as premature because allowing it would "best serve judicial economy"

(Motion, p. 9), but ignores the fact that a new trial would be necessary after final judgment on the counterclaim that was dismissed at the summary judgment stage, thereby creating the very "circuitous litigation and needless appeal" issues that Respondent claims to be trying to avoid by asking the court to dismiss this appeal at this time. It seems to Appellant that it makes far more sense to address this issue now, so that trial can be had on all proper counterclaims at the same time, and that this result serves the interests of judicial economy best. However, it also appears from the holding in the *Link* case cited above that it is the party who has lost the issue at summary judgment that has the choice of either doing an immediate appeal or waiting until final judgment to appeal, not the choice of the party who won at summary judgment. Mr. Adams has chosen to appeal this partial summary judgment order immediately, instead of waiting until final judgment to do so, since Mr. Adams believes that the lower court's ruling incorrectly states the law that applies to his false representation counterclaim, and that he should be allowed to argue this counterclaim at trial.

Lack of Necessity of Transcript of Summary Judgment Hearing

Respondent also seeks to dismiss the pending appeal due to Mr. Adam's stated intention not to order a transcript of the hearing in the lower court. Respondent believes that Appellant cannot present an adequate record without the transcript, but Appellant disagrees. Although Respondent paints Appellant's intention not to order the transcript as an attempt "to blatantly disregard this Court's rules by unilaterally deciding not to order the transcript from the hearing." (Motion, p. 11), this is not the case, as can be seen even from the title of Mr. Adams "Motion For Permission Not To Order Transcript," ("Motion For Permission") which was filed with the court

on September 14, 2020, and which Appellant incorporates by reference for the sake of judicial economy. In Mr. Adam's Motion For Permission, he sets forth the reasons why he asks the court not to require him to order the transcript of the hearing below, and why he believes the transcript is not necessary to fully present a record to support his appeal of the partial summary judgment order. As noted in Appellant's Motion For Permission, at the summary judgment hearing the lower court judge indicated his intention to rule in favor of Appellant on the counterclaim issue (see Exhibit B attached to Motion For Permission). He only changed his mind after counsel for Respondent prepared the requested order ruling in favor of Appellant on the counterclaim issue. Thereafter, Appellant filed a Rule 59(e) motion to argue against the allegedly incorrect legal position taken by the court in its Order, which position was not found to be correct by the court until after the summary judgment hearing concluded, which resulted in Appellant being given no opportunity to refute it. In these situations, it is necessary to file a Rule 59(e) motion to preserve the alleged error for review, which is what Appellant did. *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (SC 1991). Unfortunately, the trial court issued a summary Form 4 Order denying Appellant's Rule 59(e) Motion without a hearing, so Appellant was unable to argue the legal issues about the alleged incorrect legal ruling, except in his Rule 59(e) motion, but in these situations, the filing of the Rule 59(e) motion is sufficient to preserve the issue for review, even though the court does not reconsider its order. “One commentator noted: "Lawyers cannot force a trial judge to address a disputed issue." Moreover, the Supreme Court identifies two ways to preserve the issue: "a ruling by the trial judge or a post-trial motion." The language implies that a properly requested ruling under Rule 59 is sufficient without a specific judicial decision on the

matter." *Pye v. Estate of Fox*, 369 S.C. 555, 566, 633 S.E.2d 505 (SC 2006) (citations omitted). Since the trial court orally ruled in favor of Appellant at the summary judgment hearing, and only ruled against Appellant after that hearing, Appellant believes that the record created by the Rule 59(e) motion should be sufficient to preserve Appellant's arguments on the legal issue for review, without needing the irrelevant transcript from the summary judgment hearing itself.

Respondent argues that Appellant has failed to order the transcript of the hearing within 10 days, as is required by Rule 207, SCACR, and so the appeal should be dismissed on that basis as well. However, technically, that argument is incorrect. Reference to Exhibit C of Appellant's Motion For Permission shows that Appellant did attempt to order the transcript within the 10 day period of time, but accidentally addressed that transcript order to the wrong court reporter, as can also be seen from Exhibit C. Appellant thereafter attempted to locate the correct court reporter, which Appellant did shortly thereafter, but found out that the fee quoted from the private court reporter was substantially more than it would have cost from a state court reporter, as is also indicated more fully in Appellant's Motion For Permission. Appellant therefore believes that he has substantially complied with Rule 207, SCACR and that an automatic dismissal of his appeal on that basis would not be just, especially in light of his Motion For Permission which has been filed in an attempt to have the court rule on whether or not he is required to order that hearing transcript, before he is required to incur substantial fees for a transcript that he believes to be irrelevant to his pending appeal.

WHEREFORE, Appellant respectfully requests that the court deny Respondent's Motion to Dismiss his appeal, and for such other relief as the court may find to be just and proper.

Dated this September 21, 2020

/s/ John R. Cantrell, Jr.
John R. Cantrell, Jr., SC Bar # 10309
Cantrell Legal, PC
Post Office Box 1276
Goose Creek, SC 29445-1276
(843) 797-2454
lawyer@comcast.net
Attorney for Appellant

PROOF OF SERVICE

I certify that I have served a copy of the above Objection to Motion to Dismiss Appeal on all parties of record by emailing it today to Respondent's attorneys of record Robert C. Osborne III at his email address of robertosborne@parkerpoe.com and Robert H. Jordan at his email address of robertjordan@parkerpoe.com.

Dated this September 21, 2020

/s/ John R. Cantrell, Jr.
John R. Cantrell, Jr., SC Bar # 10309
Cantrell Legal, PC
Post Office Box 1276
Goose Creek, SC 29445-1276
(843) 797-2454
lawyer@comcast.net
Attorney for Appellant