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Feb 19 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

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Appeal No.: 2020-001695

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Mark Douglas Hill, III, by and through his  
Duly appointed Guardian ad Litem, Helen  
Kaci Hill, Plaintiff..... Respondent,

v.

Cranston Print Works Company d/b/a  
Cranston Trucking Company, Ryder Truck  
Rental, Inc., Optimum Staffing, Inc., d/b/a  
Optimum Logistic Solutions, and Jason E.  
Burdette, Defendants,

And

Gregory Jones, Sr., as the Father and Duly  
Appointed Personal Representative of the  
Estate of Jessica Dawn Jones, Deceased, Plaintiff, .....Respondent,

v.

Cranston Print Works Company d/b/a  
Cranston Trucking Company, Ryder Truck  
Rental, Inc., Optimum Staffing, Inc., d/b/a  
Optimum Logistic Solutions, and Jason E.  
Burdette, Defendants,

of whom Cranston Print Works Company d/b/a  
Cranston Trucking Company, Optimum Staffing, Inc., d/b/a  
Optimum Logistic Solutions, and Jason E. Burdette are the ..... Appellants.

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**APPELLANT OPTIMUM STAFFING, INC. D/B/A OPTIMUM LOGISTIC  
SOLUTIONS' PETITION FOR REHEARING**

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Pursuant to Rules 221 and 240, SCACR, Appellant Optimum Staffing, Inc., d/b/a Optimum Logistic Solutions (“Optimum”) petitions this Court to rehear its Order granting Respondents’ motion to dismiss this appeal. Because this Court’s Order has the effect of dismissing the appeal, this Petition is proper pursuant to Rule 221(c), SCACR. Optimum received this Court’s Order on February 11, 2021.

Respondents’ motion to dismiss argued both that the underlying orders were not immediately appealable and that Appellant Optimum lacked standing to appeal from the orders. This Court’s Order dismissing the appeal did not address Respondents’ argument regarding lack of standing. Rather, this Court’s Order was based solely upon a determination that the underlying orders were not immediately appealable, citing to both S.C. Code Ann. § 14-3-330 and *Ex Parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986). This ruling was based upon the Court’s overlooking or misapprehending the nature of the underlying orders, their impact upon Optimum, and Optimum’s ability to take any further action prior to appeal from the orders.

As an initial matter, though not directly addressed by this Court, Optimum does not lack standing to appeal from the underlying Order. Optimum is an aggrieved party despite the fact that the underlying orders direct another party, Appellant Jason E. Burdette (“Burdette”), to submit amended Responses to Plaintiff’s Requests for Admission. Both the South Carolina Code and the South Carolina Appellate Court Rules allow for appeal to be taken by *any party aggrieved by an order*, judgment, sentence, *or decision*. See S.C. Code Ann. §18-1-30 (emphasis added); *see also* Rule 201(b), SCACR. By the plain language of these provisions, the right to appeal is not limited merely to those parties to whom an order or decision is addressed, but extends to any party aggrieved by the order. A party is aggrieved by an order when the order “operates on his rights of property or bears directly upon his interest, the word aggrieved

referring to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation.” *Bivens v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970). Accordingly, the right to appeal is premised not on the identity of the party to whom an order is directed, but rather on whose rights are adversely affected by the rulings contained therein.

The underlying Complaints in both cases have alleged that Optimum was negligent in the following particulars:

- (a) In operating an eighteen wheeler too fast for the conditions then and there existing;
- (b) In traveling at an excessive rate of speed;
- (c) In traveling at a speed in excess of the posted speed limit;
- (d) In failing to keep a proper lookout;
- (e) In failing to properly brake or slow down to stopped traffic directly ahead;
- (f) In failing by its driver to follow the training received for his commercial driver’s license (CDL);
- (g) In failing to properly train its driver;
- (h) In failing to properly supervise and monitor its driver;
- (i) In violating federal regulations including, but not limited to, 49 CFR Sections 350-359; [and]
- (j) In failing to use the degree of care and caution that would otherwise be used by a reasonably prudent person with a CDL...

*See* Complaints, Case No. 2019-CP-42-2212 and Case No. 2019-CP-42-2215. The driver of the eighteen-wheeler was Burdette such that Plaintiffs are attempting to hold Optimum vicariously liable for Burdette’s actions, in addition to allegations of negligent training and supervision. Accordingly, Optimum is aggrieved by the Order requiring Burdette to change his responses to Requests for Admission in a manner so as to conform to the evidence as prematurely and improperly assessed by the Circuit Court. *See, e.g., Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997) (reversing sanctions against one defendant that had practical effect on other defendant of unnecessarily foreclosing a decision on the merits of this

case). Optimum had no choice but to appeal because a failure to do so would result in Judge Kelley's orders being deemed as the law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013) ("An unappealed ruling is the law of the case and requires affirmance").

Thus, like Appellant Cranston Print Works Company d/b/a Cranston Trucking Company ("Cranston"), Optimum is in a unique position where it is aggrieved by orders directed to another party. As a result, neither of the options presented in *Ex parte Whetstone* are available to Optimum. Optimum cannot refuse to comply, be held in contempt, and then appeal the contempt order because the Orders at issue do not direct Optimum to do anything. It is impossible for Optimum to follow the procedure outlined in *Whetstone* because there is nothing contained in the Orders which Optimum can refuse. Moreover, Optimum has no ability to comply with the subject Orders and it would be negatively impacted by such compliance by Burnette, as discussed *infra*. As a result, the *Whetstone* prerequisites to appeal a discovery order are not applicable to a party in Optimum's position, who are unable to be held in contempt for a failure to comply with the orders at issue.

This Court has jurisdiction over "[a]ny intermediate judgment, order or decree in a law case involving the merits," as well as over "[a]n order affecting a substantial right made in an action when such order ... strikes out an answer or any part thereof or any pleading in any action." S.C. Code Ann. § 14-3-330. An order affects a substantial right when it, among other things, strikes out a defense such that the defense is lost. *Mid-State Distrib., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334 n.4, 426 S.E.2d 777, 780 n.4 (1993). Burdette aptly argues that complying with the Orders on appeal would result in Burdette answering these and other Requests for Admission in a manner that not only is inconsistent with his prior testimony, but

also incorrect. As explicated more fully in Optimum’s Memorandum in Opposition to Respondents’ Motion to Dismiss, the Circuit Court’s determination of inconsistencies between Burdette’s deposition testimony and original responses to the Requests for Admission was made without a view of the other evidence available and premature where discovery is not yet complete. By making factual determinations of matters in dispute, the trial court has improperly imposed its own view of the evidence into the case, usurping the jury’s role as the sole finder of fact. The factual determinations by the trial court are detrimental to all of the Appellants—not just Burdette—and increase the likelihood a jury imposes liability against Burdette, which may be imputed to Optimum.

Further, the trial court’s orders arguably serve to preclude Optimum from introducing evidence to rebut these highly disputed matters. Rule 36(b), SCRCF, states an admitted matter is “conclusively established” unless the court permits withdrawal or amendment. The requests to admit at issue raise specific matters connected to Optimum’s training, monitoring, supervision, and compliance with Federal Motor Carrier Safety Regulations. Therefore, in taking the extraordinary steps to weigh evidence, decide facts at issue, and order a party to admit matters previously denied, the trial court has effectively struck Optimum’s answer denying the allegations of direct negligence. Consequently, Optimum very well may be prevented from introducing any evidence at trial contrary to the inappropriate factual findings made by the trial court, thereby blocking Optimum from mounting a viable defense to those claims. If the trial court orders are allowed to stand, Optimum will be deprived of due process under the United States Constitution. “The Due Process Clause requires all parties be given an opportunity to be heard in a meaningful way. In cases where important decisions turn on questions of fact, due process at least requires an opportunity to present favorable witnesses.” *Halsey v. Simmons*, 432

S.C. 54, 849 S.E.2d 578 (2020) (internal cites and quotation marks omitted). If left unchecked by this Court, the trial court orders will very likely deprive Optimum of its Constitutional right to due process, clearly establishing Optimum is an aggrieved party entitled to seek appellate review of this invasion of its substantial rights.

Even if Optimum *is* permitted to present evidence at trial to rebut the trial court's improper determination of the facts, Optimum would be in the untenable position of contradicting the (court-imposed) testimony of Burdette. While Optimum certainly recognizes there are instances in which parties with aligned interests are forced to take contrary positions on certain issues, those situations do not generally arise out of the trial court's decision to invade the jury's role at trial. If the trial court orders are allowed to stand and Burdette is required to change his accurate responses to less-than-accurate responses, Optimum will face the prospect of either not challenging factually-inaccurate testimony or attacking the credibility of a party who himself disagrees with the court's factual determinations but is prohibited from saying so. This cannot be the intention of the Rules of Civil Procedure or appealability jurisprudence. In sum, the trial court's orders plainly aggrieve Optimum, allowing Optimum the ability to seek appellate review of these rulings.

Because Optimum is an aggrieved party entitled to seek appellate review of the trial court orders affecting its substantial rights, and having demonstrated the *Whetstone* preconditions to appeal a discovery order are impossible for Optimum to satisfy, this Court should revisit its decision to dismiss the appeal. This Court's dismissal of the appeal eliminates Optimum's right to obtain appellate review of these orders, leaving Optimum at the mercy of Burdette's decision whether to comply with the orders or face contempt. The only way to avoid that result is to allow Optimum's appeal to proceed.

For these reasons, as well as those arguments set forth in any other Appellant's petition for rehearing not inconsistent herewith, Optimum respectfully requests this Court grant rehearing of its Order dismissing the appeal and allow this appeal to proceed.

Respectfully Submitted,

**COLLINS & LACY, P.C.**

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Columbia, South Carolina

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And

Gregory Jones, Sr., as the Father and Duly  
Appointed Personal Representative of the  
Estate of Jessica Dawn Jones, Deceased, Plaintiff, .....Respondent,

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Burdette, Defendants,

of whom Cranston Print Works Company d/b/a  
Cranston Trucking Company, Optimum Staffing, Inc., d/b/a  
Optimum Logistic Solutions, and Jason E. Burdette are the ..... Appellants.

**PROOF OF SERVICE**

I certify that I have served Appellant Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions' **Petition for Rehearing** on counsel for Mark Douglas Hill, III, by and through his Duly appointed Guardian ad Litem, Helen Kaci Hill and Gregory Jones, Sr., as the Father and Duly

Appointed Personal Representative of the Estate of Jessica Dawn Jones, and other counsel of record by emailing and depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

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February 19, 2021



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**VIA ELECTRONIC SUBMISSION AND US MAIL**

The Honorable Jenny Abbott Kitchings  
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Re: Mark Douglas Hill, III by and through his Duly appointed Guardian ad Litem Helen Kaci Hill v. Cranston Print Works Company d/b/a Cranston Trucking Company, Ryder Systems, Inc., Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions, and Jason E. Burdette/ 2019-CP-42-02212  
-and-  
Gregory Jones, Sr., as the father and duly appointed Personal Representative of the Estate of Jessica Dawn Jones, Deceased v. Cranston Print Works Company d/b/a Cranston Trucking Company, Ryder Systems, Inc., Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions, and Jason E. Burdette / 2019-Cp-42-02215

**Appellate Case No. 2020-001695**

Date of Incident: February 1, 2019  
Claim No. 309792495US  
C&L File No. 000001-02471

Dear Ms. Kitchens

Enclosed for filing is Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions' Petition for Rehearing, and Proof of Service in the above matter. We are serving all counsel of record via email and U.S. Mail.

Very truly yours,

Robert M. Peele, III

RMP/vlb  
Enclosures – As Stated

The Honorable Jenny Abbott Kitchings  
February 19, 2021  
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