THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-001269

King Street Enterprises, LLC, Ohio Imaging Associates, Inc., Mary Ann Kanters Cook a/k/a Marry Ann Kanters, and Dr. Albert James Cook II

Respondents,

v.

K-Con, Inc.

Appellant.

MEMORANDUM AS TO APPEALABILITY

Respondents, King Street Enterprises, LLC, Ohio Imaging Associates, Inc., Mary Ann Kanters, and Dr. Albert James Cook, II, through their undersigned counsel, hereby submit this Memorandum as to Appealability pursuant to the Clerk of Court's letter dated November 17, 2021.

This appeal should be dismissed on the following grounds: First, Appellant seeks to appeal an order that is not appealable. Specifically, Appellant seeks to appeal a lower court order denying its motion for partial summary judgment. (Exhibit A). As set forth below, an

order denying summary judgment is not appealable *even after a final judgment*, let alone during the course of litigation. Second, this appeal should be dismissed because Appellant seeks to appeal an order that is interlocutory and not immediately appealable. Specifically, Appellant seeks to appeal a lower court order denying its motion to stay proceedings pursuant to S.C. Code § 40-11-520, the Notice and Opportunity to Cure Nonresidential Construction Defects Act ("the Act"). (Exhibit B).[1] As set forth below, an interlocutory order not governed by a specialized appealability statute (as in the present case) is not immediately appealable unless it fits into one of the categories listed in section 14–3–330 of the South Carolina Code. Despite Appellant's strained efforts to establish otherwise, it is clear that no substantial rights are affected by this order. Third, this appeal should be dismissed because it is frivolous and serves no purpose other than to create unnecessary expense and improperly delay a trial on the merits.

STANDARD OF REVIEW

Appealability of Order Denying Summary Judgment

"[The Supreme Court of South Carolina] has repeatedly held that the denial of a motion for summary judgment is not directly appealable." Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994). The reason for this long-standing position is clear: "[T]he denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Therefore, an order denying a motion for summary judgment is not appealable" Id. at 477-478, 443 S.E.2d 379. Further, "[T]he denial of a motion for summary judgment is not appealable, ***even after*** final judgment." Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 168, 580

[1] The lower court found that contrary to Appellant's allegations, the record reflected that Respondents had indeed complied with the Act's statutory requirements.

S.E.2d 440 (2003). [Emphasis added]

Appealability of Order Denying Motion to Stay

"An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in section 14–3–330 of the South Carolina Code (1976 & Supp.2009)." Thornton v. South Carolina Electric & Gas Corp., 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011), citing Ex Parte Capital U–Drive–It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). Orders affecting a substantial right "discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." Mid-State Distribs. v. Century Importers, Inc., 310 S.C. 330, 335 n. 4, 426 S.E.2d 777, 780 n. 4 (1993).

Filing of Frivolous Appeals

Rule 269, SCACR sets forth the rule for Frivolous Appeals:

> FRIVOLOUS APPEALS, PETITIONS, MOTIONS, OR RETURNS. Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require. This Rule does not apply to any matters where counsel is required by law to pursue an appeal or petition for writ of certiorari even though the matter may be frivolous.

ARGUMENT

I. This appeal should be dismissed because Appellant seeks to appeal an order that is not appealable. An order denying a motion for summary judgment is not appealable.

As a preliminary matter, Appellant seeks the immediate appeal of the lower court's *Order Denying Appellant's Motion for Summary Judgment*, entered on September 30, 2021. (Exhibit A). Orders denying a motion for summary judgment, however, are not directly appealable. "[The Supreme Court of South Carolina] has repeatedly held that the denial of a motion for

summary judgment is **not** directly appealable." Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994). [Emphasis added]. The reason for this long-standing position is clear: "[T]he denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Therefore, an order denying a motion for summary judgment is not appealable" Id. at 477-478, 443 S.E.2d 379. Further, "[T]he denial of a motion for summary judgment is not appealable, ***even after*** final judgment." Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 168, 580 S.E.2d 440 (2003). [Emphasis added]. Accordingly, this appeal should be dismissed on the straight-forward ground that Appellant seeks to appeal an order denying summary judgment.

In an effort to circumvent the well-established rule that orders denying summary judgment are not immediately appealable, Appellant attempts to frame the order not as the court's denial of Appellant's motion, but rather as "a *Sua Sponte* Order ***granting*** Partial Summary Judgment to the Defendant." This is a tortured and misguided interpretation of the subject order, which serves no purpose other than to obfuscate and to impermissibly delay a trial on the merits.

The lower court did not grant partial summary judgment to the Defendant. It denied Appellant's motion for partial summary judgment, finding that Appellant "has not overcome its burden to characterize the liquidated damages provision in the contract as a penalty." (Exhibit A, Order, p.4). The lower court applied the law "in the light most favorable to the non-moving party," recognizing that the "burden is upon [Appellant] –the party contesting the liquidated damages provision to establish a penalty," and finding that "there is record evidence on behalf of the non-moving party that the $500 per day liquidated damages provision was bargained for" and that this amount was "reasonably intended by the parties as the predetermined measure for

compensation for actual damages that might be sustained by reason of non-performance." (Exhibit A, Order, p. 5). The Court's finding that $500.00 a day can hardly be seen as penalty in proportion to the overall amount of the contract ($364,214.00) does not amount to a *Sua Sponte* Order granting partial summary judgment because it "does not **finally** determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379 (1994). [Emphasis added]. Simply put, the lower Court's order is not a final determination on the merits. Should Appellant wish to raise its liquidated damages defense during a trial on the merits, it can do so. There is nothing barring Appellant's ability to assert its defenses at trial and/or further address the lower court's observations as to the reasonableness of the liquidated damages provisions. Accordingly, this Appeal should be dismissed.

Appellant's argument that the lower court's September 30th *Order Denying Appellant's Motion for Summary Judgment* is somehow null is also unavailing. First, Appellant's reliance on Overland, Inc. v. Nance, 423 S.C. 253, 815 S.E.2d 431(2018) and Leviner v. Sonoco Prod. Co., 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) is misplaced. Leviner and Overland centered on a lower court's jurisdictional authority to amend **final** orders in a case. Overland, for example, centered on the lower court's jurisdictional authority to reverse itself after it had already entered a **final** dispositive order **granting** summary judgment. In the present case, the lower court did not issue a final dispositive order in this case. Rather, the lower court simply denied Appellant's motion for summary judgment. An order denying a motion for summary judgment is not a final order nor is it an appealable order. Also, unlike the court in Overland, the lower court in the instant case did not reverse itself, it simply elaborated upon its ruling by way of a more detailed order, which it had already requested from counsel. Even if one were to assume *arguendo* that

the June 30th Order is null, this does not make the subject order immediately appealable. Under such circumstances, it would just be a null, unappealable order denying Appellant's motion for partial summary judgment. It is worth noting that the Court in Leviner came to a similar conclusion, stating, "Since the February order was a nullity, the final order here was the January remand order. While final, **this order was not directly appealable** since it remanded the matter to the single commissioner for further proceedings. Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994). Accordingly, **the Court of Appeals should have dismissed this appeal from the void February order**, leaving intact the January remand order." Leviner v. Sonoco Products Co., 339 S.C. 492, 494, 530 S.E.2d 127 (S.C. 2000). [Emphasis added]

II. This appeal should be dismissed because Appellant seeks to appeal an order that is interlocutory and not immediately appealable. No substantial rights are affected by the order.

Appellant seeks the immediate appeal of the lower court's *Order Denying Plaintiff's Motion for Stay* on the purported ground Respondent's did not comply with the statutory requirements of §40-11-520, the Notice and Opportunity to Cure Nonresidential Construction Defects Act ("the Act"). Notwithstanding the lower court's findings that Appellant's allegations are contradicted by the record, and that Respondents had indeed complied with the Act's statutory requirements, this appeal should be dismissed because Appellant seeks to appeal an order that is not immediately appealable. "An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in section 14–3–330 of the South Carolina Code (1976 & Supp.2009)." Thornton v. South Carolina Electric & Gas Corp., 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011), citing Ex Parte Capital U–Drive–It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). In the present case, the Notice and Opportunity to Cure Nonresidential Construction Defects Act is not governed by a

specialized appealability statute. In addition, Appellant has failed to demonstrate any way in which the subject order affects a substantial right. Specifically, Orders affecting a substantial right "discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." Mid-State Distribs. v. Century Importers, Inc., 310 S.C. 330, 335 n. 4, 426 S.E.2d 777, 780 n. 4 (1993). None of these factors are met in the present case. The lower court's order denying Appellant's motion for stay does not discontinue the action, it does not prevent an appeal, nor does this order grant or refuse a new trial or strike out an action or defense. Accordingly, the appeal should be dismissed.

III. **This Appeal should be dismissed because it is frivolous and serves no purpose other than improperly delay a trial on the merits.**

This appeal is frivolous. It serves no purpose other than to cause unnecessary expense and delay. A plain reading of the cases cited within Appellant's own brief should have served as a sufficient deterrent to appealing these orders. As set forth above, an order denying summary judgment is not appealable *even after a final judgment*, let alone during the course of litigation. This is a long-standing and easily identifiable rule. "[The Supreme Court of South Carolina] has repeatedly held that the denial of a motion for summary judgment is not directly appealable." Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994). Further, an interlocutory order not governed by a specialized appealability statute (as in the present case) is not immediately appealable unless it fits into one of the categories listed in section 14–3–330 of the South Carolina Code. Thornton v. South Carolina Electric & Gas Corp., 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011), citing Ex Parte Capital U–Drive–It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). Despite knowing and citing the standard for determining whether an order affects a substantial right, Appellant has failed to apply any of the factors to the particulars of this case.

Mid-State Distribs. v. Century Importers, Inc., 310 S.C. 330, 335 n. 4, 426 S.E.2d 777, 780 n. 4 (1993).

Regrettably, the filing of this appeal is not an isolated incident. Appellant has already been admonished by the lower court for harassing, oppressing, and annoying behavior. (Exhibit C). Accordingly, after much serious contemplation and discussion, Respondents request that this Appeal be dismissed on the grounds that it is frivolous and that appropriate sanctions be imposed pursuant to Rule 269, SCACR.

CONCLUSION

For those reasons stated hereinabove, Respondents respectfully request that the appeals filed by Appellant be dismissed.

Respectfully submitted,

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Charleston, South Carolina
November 29, 2021

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO. 2018-CP-10-3825
K-CON, INC.,	)	
	)	
Plaintiff,	)	
	)	**ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
vs.	)	
	)	
	)	
KING STREET ENTERPRISES, LLC and OHIO IMAGING ASSOCIATES INC.	)	
	)	
	)	
Defendants.	)	
	)	

This matter came before the Court July 28, 2021, 11:30 A.M. via Web-Ex on Plaintiff's Motion for Partial Summary Judgment filed of record January 25, 2021. Bill Scott, Esq. appeared on behalf of the Plaintiff and Brent Halversen, Esq. appeared on behalf of the Defendants. This matter is also consolidated with Case No. 2020-CP-10-2895. Upon review of Plaintiff's Motion, it appears Mr. Scott also moved for partial summary judgment for his individual clients in the companion case of Case No. 2020-CP-10-2895. This Order addresses the motion as it pertains to parties in both of the consolidated actions. The Motion for Partial Summary Judgment sought a ruling that there were no issues of material fact based upon four grounds, as set forth in the motion: (1) That pursuant to S. C. Code Ann. § 27-1-15, K-Con is entitled to attorneys' fees and interest at the judgment rate against Ohio Imaging Associates, Inc. because Ohio Imaging failed to make a reasonable and fair investigation and unreasonably refused to pay the undisputed amount within forty-five (45) days; (2) That Ohio Imaging's claim for liquidated damages must be dismissed

because the liquidated damages amount in the contract is an impermissible penalty; (3) That Ohio Imaging's claim for liquidated damages must be dismissed because Ohio Imaging is claiming actual damages for delay; and (4) That Ohio Imaging's claim against the individual defendants for conspiracy must be dismissed because there are no unique special damages. During the hearing, Mr. Bill Scott withdrew his request for summary judgment on this fourth ground based upon the recently decided case of Paradis v. Charleston Cty. Sch. Dist., No. 2018-002025, 2021 WL 1992245, at *6 (2021). Accordingly, the Court will not address the fourth ground in the motion, but has addressed herein the other three grounds and finds there are material issues of fact as to each of these other three grounds and the Court therefore respectfully denies the motion, for the reasons stated herein.

Summary judgment is a drastic remedy and is appropriate only when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. *Hancock v. Mid-South Management Co., Inc.,* 381 S.C. 326, 329 (2009); *U.S. Leasing Corp. v. Janicare, Inc.,* 294 S.C. 312, 364 S.E.2d 202 (Ct. App. 1988); *South Carolina National Bank v. Joyner,* 289 S.C. 382, 346 S.E.2d 329 (Ct. App. 1986). "In determining whether any trial issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id.* at 330. A party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. Am. Tel. and Tel. Co.,* 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Additionally, summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. *McAlhany v. Carter,* 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015).

Applying this standard of review to the Plaintiff's first ground, the Court believes that Plaintiff has no present right to any attorney's fees while the merits of Plaintiff's claims for monies owed are presently being litigated, pending, and are being disputed by the Defendants. At the hearing, the Defendants submitted evidence suggesting they did perform an investigation under S.C. Code §27-1-15, however, and notwithstanding this evidence, pursuant to South Carolina law, the determination of whether a reasonable and fair investigation was performed is an issue of fact for the jury and not for the Court sitting in summary judgment:

> The party seeking an award of attorney's fees and interest under the statute has the initial burden of presenting prima facie evidence that the opposing party did not make a fair and reasonable investigation. *Moore Elec. Supply, Inc. v. Ward,* 316 S.C. 367, 374–75, 450 S.E.2d 96, 100 (Ct.App.1994). Whether a party's steps taken were "reasonable and fair" is a question of fact.

Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 229, 647 S.E.2d 488, 495 (Ct. App. 2007).

Additionally, under Hardaway, a litigant has to be "successful" in order to get an award of attorney's fees. In that case, "the Court addressed the issue of the appropriate attorneys' fees award for a plaintiff that prevailed in litigation where one of the statutory remedies available to a successful litigant is an award of attorneys' fees." Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., No. 4:09-CV-1379-RBH, 2013 WL 5437712, at *21 (D.S.C. Sept. 27, 2013). Here, the Plaintiff would need to first be successful in its claims against Ohio Imaging to even be able to claim attorney's fees. The Plaintiff's success on its claims in this matter is presently disputed, undetermined, and will eventually be decided by a jury. Accordingly, Plaintiff's argument it is entitled to attorney's fees is not ripe for a determination.

Turning to the Plaintiff's second ground, that Ohio Imaging's claim for liquidated damages must be dismissed because the liquidated damages amount in the contract is an impermissible

penalty, the Court finds that the Plaintiff has not overcome its burden to characterize the liquidated damages provision in the contract as a penalty. "[t]he burden is on the party contesting the characterization set forth in the parties' contract to show that a specified sum is actually a penalty." Rental Unif. Serv. of Greenville, S.C., Inc. v. K & M Tool & Die, Inc., 292 S.C. 571, 573, 357 S.E.2d 722, 724 (Ct. App. 1987) (noting that the contract being examined by the court expressly stated that the provision was for "liquidated damages" and acknowledging that although the designation was "not necessarily conclusive of the issue of whether the sum specified in the contract is either liquidated damages or a penalty, the designation is indicative of the intention of the parties and must be accepted as the true expression of their intention until it is shown that the provision is for a penalty."

In this matter, the Defendants submitted the Affidavit of Ms. Mary Ann Kanters into the record, filed before the hearing on July 26, 2021. The Affidavit made representations that Ms. Kanters discussed with Plaintiff that the "$500 liquidated damages provision was discussed at length" and, "the importance of having this office finished on time as it was going to effect operations of the tele-radiology suite." (Affidavit, ¶ 4).

"South Carolina law allows parties to prospectively set an amount of damages for breach through the inclusion of a liquidated damages provision." ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011). "The question of whether a sum stipulated to be paid upon breach of a contract is liquidated damages or a penalty is one of construction and is generally determined by the intention of the parties." Moser v. Gosnell, 334 S.C. 425, 431, 513 S.E.2d 123, 126 (Ct. App. 1999). "The determination does not necessarily depend upon the language used in the contract." *Id.* "Rather, the determination depends upon the nature of the contract in light of the circumstances, and the attitude and intentions of the parties." *Id.*

Specifically, whe[n] the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages; and whe[n] the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty. ERIE, 393 S.C. at 460–61, 713 S.E.2d at 321 (quoting Tate v. Le Master, 231 S.C. 429, 441, 99 S.E.2d 39, 45–46 (1957)). Further, [i]n order to determine whether the sum named in a contract as a forfeiture for noncompliance is intended as a penalty or liquidated damages, it is necessary to look at the whole contract, its subject-matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach. *Id.* at 462, 713 S.E.2d at 322 (emphasis added) (quoting Foster v. Roach, 119 S.C. 102, 107, 111 S.E. 897, 899 (1922))."Whe[n] ... the sum stipulated is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an unenforceable penalty." Foreign Acad. & Cultural Exch. Servs., Inc. v. Tripon, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011) (quoting Lewis v. Premium Inv. Corp., 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002)).

Applying this law in the light most favorable to the non-moving party, and having recognized above that the burden is upon the Plaintiff- the party contesting the liquidated damages provision to establish a penalty- the Court finds there is record evidence on behalf of the non-moving party that the $500 per day liquidated damages provision was bargained for based upon the Affidavit of Ms. Kanters and that a tele-radiology medical office would generate more than $500 per day, as this amount was reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of non-performance.

Finally, the Court finds that $500.00 a day can hardly be seen as a penalty in proportion of the overall amount of the contract, to wit, $364,214.00. Accordingly, the liquidated damages provision is fair and reasonable, and not a penalty, and the Plaintiff's motion for summary judgment on this ground is denied as well.

Turning the Court's attention to the Plaintiff's third and final ground, that Ohio Imaging's claim for liquidated damages must be dismissed because Ohio Imaging is claiming actual damages for delay, the Court finds no merit. The damages claims of Defendant Ohio Imaging against K-Con under the contract in the 2018-CP-10-3825 case are grounded in the contract provision which call for liquated damages between the contracting parties K-Con, Inc. and Ohio Imaging Associates, Inc. in the event of breach. In the 2020-CP-10-2895 case, by comparison, Ohio Imaging Associates Inc. made common law tort claims against named individual Defendants, which are not subject to any contract limitation on damages. Accordingly, the Court also denies this ground for partial summary judgment on this ground as well.

The Hon. R. Kirk Griffin
Circuit Court Judge

Charleston Common Pleas

Case Caption: K Con Inc VS King Street Enterprises LLC , defendant, et al

Case Number: 2018CP1003825

Type: Order/Summary Judgment

So Ordered

s/ R. Kirk Griffin 2768

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CASE NO. 2018-CP-10-3825
K-CON, INC.,	)	
Plaintiff,	)	**ORDER DENYING PLAINTIFF'S MOTION FOR STAY**
vs.	)	
KING STREET ENTERPRISES, LLC and OHIO IMAGING ASSOCIATES INC.	)	
Defendants.	)	

This matter came before the Court July 28, 2021, 11:30 A.M. via Web-Ex on Plaintiff's Motion for Stay filed of record January 25, 2021. William Scott, Esq. appeared on behalf of the Plaintiff and Brent Halversen, Esq. appeared on behalf of the Defendants. The Court respectfully denies the motion, for the reasons stated herein.

Plaintiff filed this action on August 1, 2018. The Defendants' Counterclaims were filed on September 18, 2018. Plaintiff's Motion for Stay was filed January 25, 2021, more than two years after the filing of the Counterclaims. The Counterclaims alleged by Defendants set forth causes of action against Plaintiff for Breach of Contract and Breach of Express Warranty. The Court will assume without deciding for purposes of Plaintiff's motion, that Defendants were obligated to follow the requirements of S.C. Code Ann. § 40-11-500, *et. seq.*, the South Carolina Notice and Opportunity to Cure Nonresidential Construction Defects Act prior to filing their Counterclaims.

The Court finds, prior to the Counterclaims being filed, and contrary to the allegations of Plaintiff's Motion for Stay, that the Defendant Tenant sent two "Notices of Right to Cure Letter" to the Plaintiff, one on July 5, 2018, and another one on July 16, 2018. Both letters cited the operative notice statute, SC Code § 40-11-500. The letters cited problems with the construction work performed by Plaintiffs, namely, the storefront glass, IT work, controlled access, and water heaters. The Court finds these letters sufficient to satisfy the operative portions of the notice statute, SC Code § 40-11-530. After sending[1] the notices, the Defendants offered the Plaintiff contractor an opportunity to inspect the premises, in accordance with the statute and it is undisputed that the Plaintiff did in fact inspect the premises, and attempted to do some remedial repair work: such rights which are accorded and are set forth as under SC Code § 40-11-540(a).

Accordingly, the Court finds that the Defendants provided the Plaintiff the statutory notice for an opportunity to inspect and repair under the aforementioned statute. Based upon the submissions from the parties and documents received in the Court record concerning the notice letters and inspections- all such activity occurring prior to the Counterclaims being served by Defendants upon Plaintiff- the Court believes the Defendants complied with providing to the Plaintiff the statutorily required notice under SC Code § 40-11-500 et. seq. Based upon the record evidence submitted to the Court, the Court finds that the parties have each already invoked and complied with the statutory requirements of S.C. Code Ann. § 40-11-500, *et. seq*, and therefore, Plaintiff's Motion for Stay must be, and is respectfully, DENIED.

The Hon. R. Kirk Griffin
Circuit Court Judge

[1] Despite Plaintiff's claims that the letters were served improperly, there is undisputed evidence that Plaintiff actually received the letters.

Charleston Common Pleas

Case Caption: K Con Inc VS King Street Enterprises LLC , defendant, et al

Case Number: 2018CP1003825

Type: Order/Stay

So Ordered

s/ R. Kirk Griffin 2768

EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO. 2018-CP-10-3825
K-CON, INC.,	)	
	)	
Plaintiff,	)	
	)	**ORDER GRANTING DEFENDANTS' MOTION FOR PROTECTIVE ORDER AND/OR LIMITING DEPOSITION**
vs.	)	
	)	
	)	
	)	
KING STREET ENTERPRISES, LLC and OHIO IMAGING ASSOCIATES INC.	)	
	)	
	)	
Defendants.	)	
	)	

The Defendants filed a Motion for Protective Order and to Terminate and/or Limit the deposition of Ms. Mary Ann Kanters, such motion filed of record on September 30, 2019 regarding a deposition that was noticed and taken on September 24th and 25th of 2019 by Plaintiff's attorney, Mr. Bill Scott, Esq. (hereinafter, "Mr. Scott"). Present at the motion on Wednesday, February 26, 2020, 10:30 A.M. was Mr. Scott on behalf of the Plaintiff, K-Con, Inc., Mr. Brent Halversen, Esq. (hereinafter, "Mr. Halversen"), appearing on behalf of the Defendants King Street Enterprises, LLC and Ohio Imaging Associates, Inc., and Dan Slotchiver, Esq. appearing for Ms. Mary Ann Kanters and Dr. Albert Cook, individually. After reviewing the submissions of counsel, heard the arguments of Mr. Halversen and Mr. Scott concerning this matter, the Court finds as follows.

Ms. Kanters appeared for deposition on September 24, 2019 for three hours and the deposition was adjourned at the end of the day, continued to the following day, on

September 25, 2019. Ms. Kanters re-appeared for deposition on September 25, 2019 and after one and on-half hours of questions, Mr. Halversen terminated the deposition and moved for protective order and to terminate and/or limit the deposition pursuant to Rule 26(c) and Rule 30(d). This motion was timely filed of record with this Court five days later on September 30, 2019. The above rules state:

> (2) **Limitations**. The deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown.
>
> (d) **Motion to Terminate or Limit Examination.** At any time during the taking of the deposition, on motion of a party or the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the place where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending.

Rule 30(2)(d)

* * *

> **(c) Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense…

Rule 26(c)

This Court, upon review of the deposition transcript of Ms. Kanters, finds that Mr. Scott did engage in asking repetitive questions of Ms. Kanters. Our Supreme Court has held, "If repetitive questioning reaches the point of harassment, the witness's attorney should make a motion under Rule 30(d), SCRCP." In re Anonymous Member of S.C. Bar, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001). I find that Mr. Scott's questioning of Ms. Kanters

did reach the point of harassment, in particular, asking the same question of Ms. Kanters sixteen (16) different times. I am granting the motion as stated herein and ordering the following to occur:

IT IS ORDERED that the deposition of Ms. Kanters be reconvened and Mr. Scott will be limited to questioning of Ms. Kanters to one day, either as a witness, party, or Rule 30(b)(6) designee and that the deposition shall be concluded the day it is noticed for;

IT IS ORDERED that the deposition shall occur within the next ten (10) days from the date of the hearing on this matter, *to-wit*, March 7, 2020;

IT IS ORDERED that Mr. Scott is not to ask one single repetitive question of Ms. Kanters or otherwise conduct the deposition calculated to harass, oppress or annoy Ms. Kanters.

IT IS ORDERED that Mr. Halversen shall decide whether or not Mr. Scott is engaging in any repetitive questioning of Ms. Kanters, or otherwise conducting the deposition calculated to harass, oppress or annoy Ms. Kanters, and in that event to move for further protective order to be brought to the attention of this Court;

IT IS ORDERED that failure to be in compliance with this Order will subject Mr. Scott to the full contempt powers of this Court; and

IT IS ORDERED this Court will hold in abeyance an award of attorney's fees and costs pending review of the deposition transcript of the deposition of Ms. Kanters.

AND IT IS SO ORDERED.

Hon. Perry M. Buckner, III

Charleston Common Pleas

Case Caption: K Con Inc VS King Street Enterprises LLC , defendant, et al

Case Number: 2018CP1003825

Type: Order/Protective Order

It is so Ordered

s/ Perry M Buckner III 2122

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-001269

King Street Enterprises, LLC, Ohio Imaging Associates, Inc., Mary Ann Kanters Cook a/k/a Marry Ann Kanters, and Dr. Albert James Cook II

Respondents,

v.

K-Con, Inc.

Appellant.

PROOF OF SERVICE

I do hereby certify that on this 29th day of November 2021, I served a copy of Respondents' *Memorandum as to Appealability* on all counsel of record via their AIS-designated email at the below email addresses. Pursuant to Rule 262(C)(3), SCACR, and the Order of The Supreme Court of South Carolina, RE: Methods of Electronic Filing Under Rule 262 of the South Carolina Appellate Court Rules, entered August 25, 2021, a copy of the email to counsel is attached.

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s/Jesse Sanchez
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Charleston, South Carolina
November 29, 2021

From: **Jesse Sanchez** jesse@jessesanchezlaw.com
Subject: K-Con v. KSE - Appellate Case No. 2021-001269
Date: November 29, 2021 at 11:43 PM
To: Bill Scott bscott@pslawpc.com
Cc: Brent Halversen Brent@halversenlaw.com, Dan dan@slotchiverlaw.com, Susan Maulden paralegal@slotchiverlaw.com

Counsel,

For service, please find the attached Cover Letter and Memorandum as to Appealability, which are being filed momentarily with the South Carolina Court of Appeals via OneDrive Electronic Submission.

Regards,

Jesse

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November 29, 2021

VIA ONE DRIVE ELECTRONIC SUBMISSION
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals

November 29, 2021

VIA ONE DRIVE ELECTRONIC SUBMISSION
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: King Street Enterprises, LLC, Ohio Imaging Associates, Inc., Mary Ann Kanters Cook, and Dr. Albert James Cook II, Respondents v. K-Con, Inc., Appellant – Appellate Case No. 2021-001269

Dear Ms. Kitchings:

In accordance with the Court's letter dated November 17, 2021 requesting a Memorandum as to the Appealability of this matter, please find the following documents:

- Respondents' Memorandum as to Appealability
- Proof of Service

Thank you for your attention to this matter. Should you have any questions about this submission, please do not hesitate to contact me directly.

Sincerely,

Jesse Sanchez

Enclosures (as stated)

Cc: William A. Scott, Esq.
Brent S. Halversen, Esq.
Daniel S. Slotchiver, Esq.

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