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May 11 2022

SC Court of Appeals

**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

K-Con, Inc.,.....Appellant.

v.

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

**APPELLANT’S OPPOSITION
TO RESPONDENTS’ MOTION FOR
TAXATION OF COSTS AND MOTION FOR SANCTIONS**

The award of fees and costs under Rule 222 is within the Court’s discretion, Austin v. Stokes-Craven Holding Corp., 406 S.C. 187, 199, 750 S.E.2d 78, 84 (2013), and not appropriate under the circumstances of this case. Sanctions are not appropriate because the appeal was filed to protect Appellant’s interests.

With regard to the Order denying the motion for summary judgment, Appellant actually obtained the relief requested – an order from this court finding that the trial court order has no meaning. The order, which was prepared by Respondents’ counsel, was appealed because of affirmative language in the order stating:

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. (emphasis added). (Exhibit 16 to Memorandum on Appealability)

The language should never have been included in the order because there was no motion before the court seeking such a finding. There is no question that, had the order not been appealed, Respondents' counsel would have argued prior to trial that the order was an un-appealed final order and the finding that the amount claimed for liquidated damages was fair and reasonable was the "law of the case." Otherwise, Respondents' counsel would not have gone to such lengths to prepare the proposed order that included unnecessary and inappropriate language. The appeal avoided a future dispute that failing to appeal would have caused.

The order should never have been issued and should have been vacated based on the motion for reconsideration. As set forth in more detail in Appellant's memorandum on appealability, the trial court originally issued a simple Form 4 order denying the motion. No motion for reconsideration was filed so the order became final ten (10) days after it was filed and the court lost jurisdiction over the matter. While no motion for reconsideration was filed on the Form 4 order denying the motion of partial summary judgment, K-Con did file a motion for reconsideration of the order denying the motion to stay. In response to that motion, Judge Griffin issued a letter stating "[t]he motion for reconsideration is granted to the extent that the Court will require a detailed formal order to supplement the Form 4 entered on July 30, 2021." *Id.* The letter requested Respondents' counsel "prepare **an order** consistent with your memorandum in opposition to the Plaintiff's **motions** [sic] within 15 days and provide Mr. Scott an opportunity to review **it**. Then please submit **it** to efile for my review." Despite being asked to prepare "an order" denying the motion to stay, Respondents' counsel prepared two proposed orders, one denying the

motion to stay and one denying the motion for partial summary judgment. When Respondents' counsel submitted the two proposed orders to Appellant's counsel for review, Appellant's counsel advised no order denying the motion for partial summary judgment was required. Despite being told no order was required on the motion denying partial summary judgment, Respondents' counsel submitted the two proposed orders to Judge Griffin.¹ Upon receipt of the signed order denying the motion for partial summary judgment, Appellant's counsel first notified Judge Griffin by letter and then by a motion for reconsideration that the order should not have been signed, the court had no jurisdiction over the matter, and the order should be vacated. Judge Griffin denied the motion for reconsideration. Had the order not included the affirmative language, or if the order had been vacated, no appeal would have been filed.

Under these circumstances, an award of attorneys' fees is not appropriate. The order should never have been issued, it contained inappropriate affirmative language, and the order should have been vacated on the motion for reconsideration. This court's order dismissing the appeal stating the order has no meaning is exactly what Appellant sought.

With regard to the order denying K-Con's Motion to Stay pursuant to S.C. Code § 40-11-520, South Carolina Notice and Opportunity to Cure Nonresidential Defects Act, an award of attorneys' fees is not warranted. The Act mandates that the court shall stay the case until the claimant complies with the Act. *Id.* There has been no prior case law regarding this statute or whether the failure to issue a stay is immediately appealable, an issue that is significant to attorneys litigating construction defect cases. Considering the express language in the statute mandating a

¹After receiving both proposed orders from Respondents' counsel, Judge Griffin confirmed he only requested one order denying the motion to stay, but declined to vacate the other order denying the motion for partial summary judgment submitted by Mr. Halversen. (See, Exhibit 13 to Memorandum on Appealability).

stay and the lack of any case law on the issue, the appeal was appropriate and had to be filed to protect K-Con's interests. An award of attorneys' fees is not warranted under these circumstances.

Sanctions are not appropriate under Rule 269, SCACR, because the appeal had to be filed to protect K-Con's interests. The decision to file the appeal was not made lightly and only after Appellant's counsel discussed the orders with two other attorneys, Donald Howe and Mark Koontz, who agreed that an appeal was appropriate. See Exhibit 1, Affidavit of Donald H. Howe; Exhibit 2, Affidavit of Wm. Mark Koontz.

Respondents contend that since Mr. Halversen advised Appellant's counsel that the orders were interlocutory and not appealable, sanctions should be imposed. Respondents fail to acknowledge that the appeal of the order denying the motion for summary judgement was the direct result of the proposed order that included inappropriate language and that never should have been submitted. Both Mr. Howe and Mr. Koontz agreed that the finding in the order that the liquid damages rate was fair and reasonable and not a penalty had to be appealed to avoid any argument that the finding was the "law of the case." Exhibit 1, ¶ 5; Exhibit 2, ¶¶ 4, 6.

Similarly, the order denying the motion to stay had to be appealed to protect K-Con's interests. As explained by Mr. Koontz in his affidavit, this is a significant issue to attorney litigating construction defect case and to their clients because of the benefits the Act provides. Exhibit 2, ¶ 5. The Act is intended to avoid litigation. Prior to this court's order, the issue of whether the failure to issue a stay under the Nonresidential Defects Act was immediately appealable had not been addressed by the court. Had the appeal not been filed, and the court later determined the stay was immediately appealable, the failure to appeal would have been prejudicial to Appellant. The appeal was filed after discussions with Mark Koontz, who agreed the appeal was appropriate. Exhibit 2, ¶¶ 5, 6. Since this issue had not been addressed by the court before,

and because the failure to appeal could have been prejudicial to K-Con, the appeal cannot be considered frivolous.

For the foregoing reasons, the motion for costs, fees and sanctions should be denied.

Respectfully submitted,

s/William A. Scott
William A. Scott
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Attorney for Appellant

Dated: May 11, 2022

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

K-CON, INC.,

Plaintiff,

v.

KING STREET ENTERPRISES, LLC, and
OHIO IMAGING ASSOCIATES, INC.,

Defendants.

CASE NO. 2018-CP-10-3825
(Consolidated with
CASE NO. 2020-CP-10-2895)

OHIO IMAGING ASSOCIATES, INC.,

Plaintiff,

v.

EDWARD KIRSCH, LUTHER RAMSEY,
SHAWN CANTEY, PATRICK KIERNAN,
AND DAN D'ORIO,

Defendants.

AFFIDAVIT OF DONALD H. HOWE

1. My name is Donald H. Howe, I am over the age of eighteen and I am giving this affidavit of my own free will based on my personal knowledge of the facts stated herein.
2. I am an and attorney licensed to practice law in South Carolina, have practiced law for over 30 years, and have been involved in many appeals.
3. I have known William (Bill) A. Scott for over 30 years and have been involved with him on several cases over the years. Over the years we have discussed and asked the other's opinion on various legal issues that each of us have run into in our law practices.

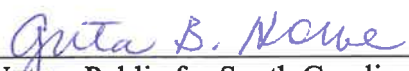
4. In 2020, Mr. Scott and I began the representation of Scott and Crystal Bishopp and Bishopp's Chicken Biscuits in litigation against Mary Ann Kanters and others. (See, Maryann Kanters v. Bishopp's Chicken Biscuits, LLC, et. al., C.A. No. 2020-CP-10-0166; Blue Water Electric, LLC v. Bishopp's Chicken Biscuits, LLC, et. al., C.A. No. 2020-CP-10-0282). In connection with that litigation, Mr. Scott discussed with me the above reference case with K-Con since it also involved Ms. Kanters.
5. Last fall, Mr. Scott told me that he had filed a motion for partial summary judgement in the K-Con case challenging the liquidated damages amount, however, the court issued an order prepared by opposing counsel that went beyond the scope of the motion and found the liquidated damages amount was fair and reasonable and not a penalty. Mr. Scott also expressed his concern that if the order was not appealed, opposing counsel would argue that the order was final and the finding that the liquidated damages amount was fair and reasonable and not a penalty was the "law of the case." After a discussion on the matter, I agreed that it was wiser to file an appeal challenging the finding in the order on liquidated damages than to not file an appeal, because a failure to timely raise the issue might forfeit the challenge on behalf of the client. The risk of not raising the issue on appeal was just too substantial under the circumstances.

Further affiant sayeth not.



Donald H. Howe

SWORN to before me this
9th day of May, 2022



Notary Public for South Carolina
My Commission Expires: 12/19/29

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

K-CON, INC.,

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CASE NO. 2018-CP-10-3825

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OHIO IMAGING ASSOCIATES, INC.,

Plaintiff,

v.

EDWARD KIRSCH, LUTHER RAMSEY,
SHAWN CANTEY, PATRICK KIERNAN,
AND DAN D'ORIO,

Defendants.

AFFIDAVIT OF WM. MARK KOONTZ

1. My name is Wm. Mark Koontz, I am over the age of eighteen and I am giving this affidavit of my own free will based on my personal knowledge of the facts stated herein.
2. I am an attorney licensed to practice law in South Carolina since 2000. The primary areas of my practice are construction contracts, mechanic liens and construction defect cases.
3. I have known William (Bill) A. Scott for essentially the entire time I have practiced law. Over the years we have worked on numerous cases including cases where our clients had

similar interests and in cases where our clients had opposing interests. We have also regularly consulted with each other regarding various legal issues on cases we have.

4. Last fall, Mr. Scott told me about two (2) orders that had been issued in the K-Con case, a matter we had discussed before because it dealt with construction, liquidated damages and the South Carolina Notice and Opportunity to Cure Nonresidential Defects Act, S.C. Code § 40-11-500, *et seq.* (“Nonresidential Defects Act”). Mr. Scott told me one order denied a motion for partial summary judgment challenging the liquidated damages amount. However, the court issued an order prepared by opposing counsel that went beyond the scope of the motion and found the liquidated damages amount was fair and reasonable and not a penalty. Mr. Scott expressed his concern that if the order was not appealed, opposing counsel would argue later at trial that the order was final and the finding that the liquidated damages amount was fair and reasonable and not a penalty was the “law of the case.”
5. Mr. Scott told me the second order denied a motion to stay pursuant to the Nonresidential Defects Act. Mr. Scott and I have had regular discussions regarding the Nonresidential Defects Act and the corresponding South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, § 40-59-810, *et seq.* Both Acts require that the court stay a case until the Act is followed, however, there has been no case law on whether the failure to issue a stay is immediately appealable. This is a significant issue to attorneys litigating construction defect cases and to clients, particularly contractors and subcontractors, because the Acts mandate that such licensees be given an opportunity to inspect, document, and offer to cure the alleged defects prior to commencement of suit or correction of the alleged defects by owner.

6. After discussing both orders, I agreed that it was wiser to file an appeal challenging both orders than to not file an appeal. On the order denying the motion for partial summary judgment on liquidated damages, the failure to appeal the affirmative finding that the liquidated damages amount was fair and reasonable and not a penalty almost certainly would have resulted in opposing counsel arguing that was the law of the case. Similarly, an appeal of the order denying the motion to stay was prudent because there is no law on that issue, and had the order not been appealed and the court later found the matter was immediately appealable, the failure to appeal may have been prejudicial to Mr. Scott's client.

Further affiant sayeth not.

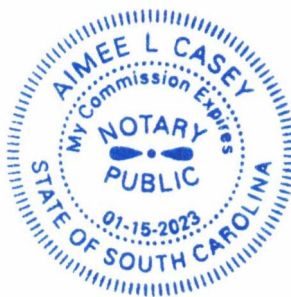

Wm. Mark Koontz

SWORN to before me this

10th day of May, 2022


Notary Public for South Carolina

My Commission Expires: 01/15/2023



THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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v.

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

PROOF OF SERVICE

I certify that I have served the Appellant's Memorandum in Opposition to Respondents' Motion for Taxation of Costs and Motion for Sanctions dated May 3, 2022, by emailing a copy of it to: Brent Halversen, Esq., at Brent@halversenlaw.com; Daniel S. Slotchiver, Esq., at dan@slotchiverlaw.com; and Jesse Sanchez, Esq., at jesse@jessesanchezlaw.com. A copy of the email is attached.

May 11, 202

s/William A. Scott
William A. Scott
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Attorney for Appellant

Bill Scott

From: Bill Scott
Sent: Wednesday, May 11, 2022 5:02 PM
To: Jesse Sanchez; Brent Halversen; Daniel S Slotchiver
Subject: K-Con v. Ohio Imaging, Appellate Case No. 2021-001269
Attachments: Appellate Case 2021-001269 - Appellants Opposition To Motion for Costs and Sanctions.pdf

Gentlemen:

Please find attached for service on you Appellant's Opposition to Respondents' Motion for Costs and Motion for Sanctions.

Please contact me if you have any questions.

With regards,

William A. Scott, Esq.
Pedersen & Scott, P.C.
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