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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

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.

RESPONDENTS' REPLY TO APPELLANT'S RETURN IN OPPOSITION TO RESPONDENTS' MOTION FOR TAXATION OF COSTS AND MOTIONS FOR SANCTIONS

Respondents, King Street Enterprises, LLC, Ohio Imaging Associates, Inc., Mary Ann Kanters, and Dr. Albert James Cook, II, through their undersigned counsel, hereby respectfully submit this Reply to Appellant's Return in Opposition to Respondents' Motion for Taxation of Costs and Motion for Sanctions.

Respondent's Motion for Taxation of Costs is appropriate. First, Appellant sought to appeal an order that is not directly appealable, specifically, an order denying Appellant's motion for partial summary judgment. As set forth in Respondent's *Memorandum as to Appealability*,

an order denying summary judgment is not appealable *even after a final judgment*, let alone during the course of litigation. Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 168, 580 S.E.2d 440 (2003).

Appellant also sought to appeal an 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. This order was also clearly not appealable because it was an interlocutory order, not governed by a specialized appealability statute, and because it did not fall under any of the categories listed in section 14-3-330 of the South Carolina Code. See Thornton v. South Carolina Electric & Gas Corp., 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011), stating "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)."

This order was also not appealable because it did not affect a substantial right. Specifically, the order did not "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). Accordingly, Appellant's contention that it had no caselaw to guide its decision on whether to file an appeal is unavailing.

Appellant and its counsel knew that the subject orders were interlocutory and not directly appealable. As noted in Respondents' Motion for Costs and Sanctions, Appellant's counsel was specifically advised by Respondents' counsel that the orders were interlocutory and not immediately appealable. Appellant also had ample opportunity to research the issue, which it did. A plain reading of the cases cited in Appellant's own Memorandum as to appealability should have served as a sufficient deterrent to appealing the orders. Nevertheless, Appellant

filed a Notice of Appeal anyway, effectively bringing this case at a stand-still for nearly six months. The appeal served no purpose other than to cause unnecessary expense for Respondents and delay a trial on the merits.

Taxation of Costs is appropriate because Respondents were forced to hire an appellate attorney to review the case in preparation for an Appeal and draft a Memorandum as to the Appealability of the subject orders. Had Respondents not appealed what are clearly unappealable orders, Respondents would not have incurred such costs.

Sanctions are also appropriate because Appellant's motivation for appealing the orders were, regrettably, disingenuous. In its Memorandum as to the appealability of the subject orders, for example, Appellant goes to great lengths to frame the lower court's order *denying* partial summary judgment as "a *Sua Sponte Order* ***granting*** Partial Summary Judgment to the Defendant." As set forth in Respondents' *Memorandum*, the lower court did not grant partial summary judgment to the Defendant. It denied Appellant's motion for partial summary judgment.

Even now, in its *Return* to Respondents' Motion for Costs and Motion for Sanctions, Appellant has the temerity to state "Appellant actually obtained the relief requested—an order form this court ***finding*** that the trial order has no meaning." (Return, Page 1, Emphasis Added). It is incomprehensible how Appellant could so boldly and falsely mischaracterize this Court's very own March 18, 2022 Order. This Court did not ***find***—nor even suggest—that "the trial order has no meaning." It found, instead, that that Appellant had sought to appeal orders that were not immediately appealable. This very tendency to mischaracterize the clear meanings of an Order is what brought the parties before this Court in the first place. It was not appropriate then, and it is not appropriate now.

Appellant now attempts to wash its hands and excuse the filing of this frivolous appeal by stating that its counsel had consulted other attorneys prior to filing the Notice of Appeal. Significantly, however, none of affidavits submitted in support of Appellant's position cite any caselaw or provide any legal justification for filing a Notice of Appeal as to these interlocutory orders. Appellant's counsel notably sought the advice of his ***own co-counsel*** in another active case against one of the Respondents, Maryann Kanters (Maryann Kanters v. Bishopp's Chicken Biscuits, LLC et. Al. C.A. No. 2020-CP-10-0166; Blue Water Electric, LLC v. Bishop's Chicken Biscuits, LLC et al., C.A. No. 2020-CP-10-0282). Said advice, however well-intentioned, cannot be said to be sufficiently objective and/or removed from the present matter.

In any event, the filing of this frivolous appeal is not an isolated incident. As set forth in Respondent's Memorandum, Appellant has already been admonished by the lower court for harassing, oppressing, and annoying behavior. (Exhibit A). This appeal is just one more attempt to harass and annoy Respondents by causing unnecessary expense to them and delay a trial on the merits. Accordingly, Respondents respectfully request that this Court grant its Motion for Taxation of Costs and Motion for Sanctions.

CONCLUSION

For the forgoing reasons, the above-named Respondents respectfully request that this Court grant their Motion for taxation of Costs and order Appellant to pay $2,500.00 in Attorney's Fees as set forth by Rule 222, SCACR and the January 16, 2018 Order by the Supreme Court. In addition, Respondents request that this Court grant sanctions against K-Con, Inc. and its Counsel in an amount sufficient to discourage such conduct in the future with regard to this or any other matter.

Respectfully submitted,

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Attorneys for All Respondents

May 16, 2022
Charleston, South Carolina

EXHBIT 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 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

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R. Kirk Griffin, Circuit Court Judge

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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 16th day of May 2022, I served a copy of Respondents' *Reply to Appellant's Return in Opposition to Respondents' Motion for Taxation of Costs and Motion for Sanctions* 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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Attorney for all Respondents

Charleston, South Carolina
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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:

Attached for filing, please find Respondents' *Reply to Appellant's Return in Opposition to Respondents' Motion for Taxation of Costs and Motion for Sanctions* and corresponding 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

Cc: All Counsel of Record

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