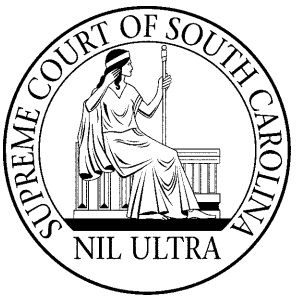

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20
May 24, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Poynter Investments, Inc., Donald J. Poynter, and Sharon K. Poynter, Respondents,

v.

Century Builders of Piedmont, Inc., and Clyde W. Rector, Appellants.

Appeal from Greenville County
Steven H. John, Circuit Court Judge

Opinion No. 26821
Heard April 21, 2010 – Filed May 24, 2010

REVERSED

D. Randale Moody, II and Joseph O. Smith, both of Roe, Cassidy, Coates & Price, of Greenville, for Appellants.

Cecil H. Nelson, Jr. and J. Nathan Galbreath, both of Nelson, Galbreath Law Firm, of Greenville, for Respondents.

JUSTICE PLEICONES: This is an appeal from an order granting a preliminary injunction to enforce a non-competition agreement, but modifying the territorial restriction in that agreement. Appellants contend the trial court did not properly balance the equities in deciding to grant the injunction. We hold that a balancing of equities is not a separate component in the preliminary injunction analysis. Appellants also contend the trial court erred in "blue penciling" the contract by replacing the unreasonable territorial restriction in the agreement with one of its own. We agree, and reverse.

FACTS

Appellant Rector sold his business to respondent Poynter Investments (Poynter) in 2007. On the same day, the parties entered an "Employment and Non-Competition Agreement," supported by separate consideration, by which Poynter agreed to employ Rector for one year, and Rector agreed to a four year non-competition clause which included this territorial restriction:

> 1. Definitions. In addition to other terms defined elsewhere in this Agreement, unless the context shall expressly or by necessary implication indicate to the contrary, as used herein, the following terms shall have the following meanings:
>
> (a) "Business" is as defined hereinabove.
> (b) "Restricted Territory" means:
> (i) An area encompassing seventy-five (75) miles in any direction from the Premises.
>
> (ii) In the event the preceding subparagraph (i) shall be determined by judicial action to be unenforceable, the "Restric ted Territo ry" shall b e Greenville County, South Carolina and any county that borders Greenville County, South Carolina.

(iii) In the event the preceding subparagraph (ii) shall be determined by judicial action to be unenforceable, the "Restric ted Territo ry" shall b e Greenville County, South Carolina.

In 2008, Poynter sued appellants alleging they had breached the terms of the sales agreement as well as the non-competition agreement, and sought to enforce that agreement during the pendency of the litigation. The trial judge found Poynter would suffer irreparable harm unless the agreement were enforced, but, without further explanation, ordered:

> the [appellants], including any entity associated with [appellants], to be enjoined and restrained from violating the terms of the non-compete covenant within Greenville County, South Carolina and within an area encompassing fifteen miles in any direction from [the Premises].

Appellants moved to have the court reconsider this order, but that request was denied. This appeal follows.

ISSUES

1) Did the trial judge err in refusing to balance the equities after determining Poynter was entitled to a preliminary injunction?

2) Did the trial judge err in rewriting the territorial limitation in the non-compete clause?

ANALYSIS

1. Balancing the Equities

Appellants contend the trial judge committed reversible error when he refused to balance the equities before enforcing the non-compete agreement. We clarify that there is no separate requirement that a judge perform such a balancing before deciding to issue a preliminary injunction.

A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law. E.g., AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009) (internal citation omitted). An additional requirement, that after a finding that the moving party had shown these three elements the trial court then balance the equities, was added by the Court of Appeals in County of Richland v. Simpkins, 348 S.C. 664, 560 S.E.2d 902(Ct. App. 2002). This additional requirement appears in at least three other preliminary injunction decisions issued by the Court of Appeals between Simpkins and AJG Holdings: MailSource, LLC v. M. A. Bailey & Assoc., 356 S.C. 363, 588 S.E.2d 635 (Ct. App. 2003); Levine v. Spartanburg Reg. Serv. Dist., Inc., 367 S.C. 458, 626 S.E.2d 38 (Ct. App. 2005); and Peek v. Spartanburg Reg. Healthcare Sys., 367 S.C. 450, 626 S.E.2d 34 (Ct. App. 2005).

The authority cited for the balancing requirement is Foreman v. Foreman , 280 S.C. 461, 313 S.E.2d 312 (Ct. App. 1984). Foreman, however, did not involve a request for injunctive relief, but was instead an equitable division case. In our view, the "balancing the equities" requirement is neither necessary nor appropriate in a preliminary injunction case, where the three requirements (irreparable harm, success on merits, and inadequate remedy at law) are well established and clearly delineate the burden of proof and of persuasion. Moreover, the balancing requirement is subsumed by the

irreparable harm and inadequate remedy at law components of the three-part test.

We therefore modify these five Court of Appeals decisions to the extent they include a separate "balancing the equities" requirement. The trial judge here did not err in declining to perform this extra task.

2. Geographical Restitution

Appellants contend the trial judge exceeded his authority in rewriting or "blue-penciling" the territorial restriction. We agree.

Neither this Court, nor the Court of Appeals, has directly addressed the authority of a court to decrease the geographical limitations in an overly broad non-compete agreement. However, this Court has held that it would violate public policy to allow a court to insert a geographical limitation where none existed. See Stonhard, Inc., v. Carolina Flooring Spec., Inc., 366 S.C. 156, 621 S.E.2d 352 (2005). Stonhard held that such a reformation would be void, as it would add a term to the contract that the parties neither negotiated nor agreed to. Id. The Court of Appeals has held that it would be impermissible to extend the non-compete period contained in the agreement as a remedy for its breach, since such an extension "would essentially re-write the parties' contract, a service the courts of South Carolina do not perform." MailSource, LLC, 356 S.C. at 369, 588 S.E.2d at 639 (Ct. App. 2003).

Finally, in Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995), the Court of Appeals upheld the trial court's finding that a non-compete agreement was overbroad in that it purported to prevent the defendant, an esthetician, from being associated in any capacity with a business that competed with the original business. The original business brought suit to enforce the covenant when the defendant went to work for a competitor as a manicurist. On appeal, the court noted that at trial the original business had agreed to limit the agreement to its "spirit" rather than its literal terms, but held that a party could not convert an overbroad clause

into an enforceable one by agreeing to an interpretation that artificially limited the actual terms used in the contract.

These cases stand for the proposition that, in South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms. We hold, therefore, that the trial judge erred in rewriting the territorial restriction in the parties' contract.

CONCLUSION

We reverse the order which purports to enforce a non-competition agreement on terms other than those agreed upon by the parties. We also note that the parties appear to be laboring under the misconception that the appeal of this preliminary injunction prevented the circuit court from proceeding with the merits of the case. An order granting a preliminary injunction is immediately appealable under S.C. Code Ann. § 14-3-330(4) (Supp. 2009). Section 14-3-450 (1976) explicitly provides where an appeal is permitted by § 14-3-330(4), "the proceedings in other respects in the court below shall not be stayed during the pendency of the appeal unless otherwise ordered by the court below." Accordingly, unless ordered by the trial court, an appeal from a preliminary injunction order does not prevent the case moving forward on the merits.

REVERSED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kent Blackburn and Alison R. Minnich, Petitioners,

v.

TKT and Associates, Inc., Martha C. Carver, and Raymond T. Windham, Respondents.

and

TKT and Associates, Inc., Martha C. Carver, and Raymond T. Windham, Defendants/Cross-Claimants,

v.

Palmetto Medical Equipment of Florence, LLC and Palmetto Medical Equipment, Inc., Third Party Defendants.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 26822
Heard April 21, 2010 – Filed May 24, 2010

REVERSED AND REMANDED

Louis D. Nettles, of Folkens & Jernigan, of Florence, for Petitioners.

J. Rene Josey and C. Pierce Campbell, both of Turner, Padget, Graham & Laney, of Florence, for Respondents.

JUSTICE PLEICONES: Two shareholders in a corporation sued for dissolution and damages based on their belief that two other shareholders were draining profits by taking excessive salaries from the corporation. The trial judge found in favor of the plaintiff shareholders and, rather than order dissolution, ordered the defendant shareholders to buy the shares of the plaintiff shareholders. An appraisal was conducted pursuant to the trial court's order but, in valuing the future earnings of the corporation, the appraisal included the salaries that the trial judge found improper, thereby lessening the value of the corporation. The plaintiff shareholders moved before a different judge to vacate the appraisal, but their motion was denied and the Court of Appeals affirmed. See Blackburn v. TKT and Assoc., Inc., 382 S.C. 71, 675 S.E.2d 448 (Ct. App. 2009). This Court granted certiorari. We now reverse the decision of the Court of Appeals and remand to the circuit court.

FACTS

In late 2002, Kent Blackburn, Tina Carver, and Raymond Windham formed a corporation, operating as the Carolina Mobility Center (Carolina Mobility), to sell durable medical equipment. The newly formed company borrowed $50,000 for capital and each of the three members signed on the

note. In early 2003, the shareholders agreed to hire Alison Minnich as an employee, at a salary of $34,000.[1] In addition, Minnich received a 10% stake in the company. Blackburn, Carver, and Windham each held a 30% stake.

In 2004, in addition to paying Minnich's salary, Carolina Mobility paid salaries to Carver and Windham of nearly $34,000 each. Carver and Windham received salaries of $13,333.33 each in 2005. The shareholders also received disbursements in accordance with their stakes in the company. Carver was responsible for signing checks on behalf of the corporation.

A dispute developed among the members of the corporation and Blackburn and Minnich (collectively "Petitioners") filed suit alleging that, as Carolina Mobility became profitable, Carver and Windham (collectively "Respondents") began paying themselves from the corporate funds, amounts disguised as salaries for minimal or non-existent contributions to the corporation. As a result, Petitioners alleged that Respondents lessened the value of Petitioners' ownership interest in Carolina Mobility. Petitioners asked that the corporation be dissolved and that the Respondents be required to pay Petitioners the lost value of their stock.

After a bench trial, Judge Thomas Russo issued an order (Judge Russo's Order) finding in favor of Petitioners. Judge Russo found that the Respondents "have engaged in a pattern of improperly draining the assets of the corporation through claims of services as employees of the corporation, and have improperly represented to the other shareholders their activities on behalf of the corporation." Specifically, Judge Russo found that Respondents "paid Minnich her salary and then split the rest of the earnings as individual salaries instead of profit, thus devaluing the corporation." Rather than dissolve the corporation as Petitioners requested, Judge Russo elected to require Respondents to purchase Petitioners' shares at Fair Market Value.[2]

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[1] Carver testified that Minnich's salary was $31,200.

[2] Though S.C. Code Ann. § 33-14-300 allows a court to dissolve a corporation, S.C. Code Ann. § 33-14-310(d) allows the court to instead order other relief, including providing for the purchase at their fair value of shares of any shareholder.

The court order concluded: "Following the appraisal, [Petitioners] should be paid in accordance with their percentage of the corporation's shares." No party filed a Motion for Reconsideration.

In accordance with the trial court's order, the parties agreed on an appraiser (Appraiser). The parties also agreed on a valuation method, choosing the "income approach." In the Appraiser Report (Report), Appraiser valued the total shares in Carolina Mobility at $34,300. Petitioners filed objections to the Report on the ground that it did not account for the corporation's loss in value due to Respondents' improper actions. Petitioners moved that the Report be vacated and that Appraiser be instructed to value the corporation only after "normalizing the earnings of the corporation in a manner consistent with [Judge Russo's order]." Respondents filed a motion to enforce the judgment in accordance with the Report.

A hearing was held before Judge Michael Nettles on the motions. Judge Nettles issued an order (Judge Nettles's Order) granting Respondents' motion to enforce the judgment and ordering payment to Petitioners in accordance with their percentage shares. Petitioners appealed and the Court of Appeals affirmed. This Court granted certiorari to review the decision of the Court of Appeals.

ISSUE

Did the Court of Appeals err in upholding the trial court's decision denying Petitioners' Motion to Vacate the Report?

DISCUSSION

A. Terms of the Appraisal

Petitioners' contend that the Appraiser failed to conform to the agreed-upon guidelines in conducting the appraisal. We agree with Petitioners that

by failing to make "normalization adjustments," the Appraiser did not comply with the "income approach," and the Appraisal should be vacated.

As noted, in his order, Judge Russo required the parties to agree on an impartial corporate appraiser to compute the corporation's value. The parties did so. In an Engagement Letter to Respondents' attorney, Appraiser outlined the "terms and objectives" of the valuation. Under the terms of the letter, Respondents acknowledged that Appraiser's "services and work product" would be subject to the terms of the letter, including the attached "Exhibit 1." Exhibit 1 provided that the analysis would be done in accordance with the Statement of Standards for Valuation Services of the American Institute of Certified Public Accountants (AICPA) and National Association of Certified Valuation Analysts (NACVA).

B. The Income Approach

The parties also agreed on a method for valuating the corporation, selecting the "income approach" from three options.[3] The "income approach" or "investment value" approach[4] is a method for ascertaining the present value of a corporation's expected future earnings. See 14 Business Organizations with Tax Planning § 186.05[2] (Matthew Bender) (2010). "This figure is obtained by multiplying a recent year's financial performance or an average of recent years' performances by a capitalization ratio selected to reflect the corporation's future prospects." Id.

C. Normalization

Petitioners complain that Appraiser omitted a key step in conducting the "income approach" valuation – normalization. The standards of the

[3] Counsel for Petitioners explained that there are three methods for valuating a corporation: (1) the asset method; (2) the fair market value method; and (3) the income approach.

[4] See Quill v. Cathedral Corp., 627 N.Y.S.2d 157, 159 (N.Y. App. Div. 1995) (recognizing that the "investment value" approach is also referred to as the "income approach").

AICPA[5], by which Appraiser agreed to conduct the valuation, require that in conducting the "income approach," the appraiser must consider "normalization adjustments."[6] Statement on Standards for Valuation Services: Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset § 33 (Am. Inst. of Certified Pub. Accountants 2007) [hereinafter "AICPA Standards"][7]. The AICPA Standards define "Normalized Earnings"[8] as "economic benefits adjusted for nonrecurring, noneconomic, or other unusual items to eliminate anomalies and/or facilitate comparisons."

Additionally, the NACVA Standards provide that "historical financial statements should be analyzed and, if appropriate, adjusted to reflect the appropriate asset value, income, cash flows and/or benefit stream, as applicable, to be consistent with the valuation method(s) selected by the member." Professional Standards, § 3.9 (Nat'l Ass'n of Certified Valuation Analysts 2002) [hereinafter "NACVA Standards"].[9]

In conducting the valuation, Appraiser e-mailed attorneys for Petitioners and Respondents and asked them to comment on salaries paid to the shareholders from 2003-2005 and to state a reasonable compensation for that period. Counsel for Respondents replied as follows:

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[5] The AICPA Standards were not issued until June 2007 and were not effective until January 2008. Nonetheless, the Standards were available in draft form in 2006 and the Engagement Letter stipulated that they would be used in the valuation.

[6] As Judge Nettles noted that Petitioners were "protected on the record," we find the AICPA Standards are properly before us.

[7] The AICPA Standards are available on the AICPA website at: http://fvs.aicpa.org/NR/rdonlyres/672E1DD4-2304-47CA-8F34-8C5AA64CB008/0/SSVS_Full_Version.pdf.

[8] The glossary definition of "Normalization" within the AICPA Standards provides "see Normalized Earnings."

[9] The NACVA Standards are available on the NACVA website at: http://nacva.com/association/A_pro_stand.asp.

> My clien ts' po sition is th at the sa laries the y receive d were consistent with the ir contrib ution to the comp any. We have maintained this po sition prior to and at the trial of th is matte r. With that said, the judge states in his order that our salaries were in excess of the contributions. However, he does not state how excessive. I would suggest reviewing the briefs submitted by the two parties on this issue. I believe we both made arguments therein.
>
> Unless Louis is willing to sugge st an amount, it may be most helpful for you all to determine what you think may have been appropriate for each person and then see if we can agree to that number.

Counsel for Petitioners responded as follows:

> You have hit on the heart of the is sue that was before th e court. The Plaintiffs contended that the payments to Carver and Windham were not for services rendered to the Corporation but rather were simp ly a lootin g of the corporate profits. The testimony before the court was that Carver and Windham were not working for Carolina Mobility but rather were spending their time in their other businesses. Carver did do some administrative work for Carolina Mobility, primarily paying the bills as she controlled the company checkbook. The work Carver did was part time administrative work which required only a low skill level. Carver and Windham both claimed to be full time employees of Carolina Mobility (TKT) b[ut] the Court ruled otherwise. I would refer you to th e [sic] Judge Russo's order. . . . You should follow Judge Russo's order and while it might be proper to assign some value to Carver's services[,] the vast majority of the payment[s] to Blackburn, [10] Carver and Windham

[10] It is unclear why Petitioners' counsel asks that payments to Blackburn be reversed. Blackburn did not receive a salary and was only paid when distributions were made to the other majority shareholders.

should be reversed to properly normalize the corporation[']s income.

Despite the e-mail exchange with the attorneys, in the final valuation, Appraiser made no adjustment for the salaries. On Exhibit 2 of the valuation, the entries for "Normalizing Adjustments" were filled only with a dash. Appraiser valued the corporation at $34,300 based on the corporation's performance from 2003-2005.

D. Conclusion

By failing to make normalizing adjustments, Appraiser did not abide by the agreed-upon method in conducting the valuation. Respondents' excessive salaries constituted unusual expenses which should have been removed in order to appropriately value the corporation. Moreover, Appraiser's failure to normalize contradicted Judge Russo's order. As noted, the "income approach" provides a method of ascertaining the present value of a corporation's expected future earnings. By failing to make adjustments, Appraiser effectively rewarded Respondents for their misconduct by factoring their unmerited salaries into calculating the corporation's future value.

We disagree with the conclusion of the Court of Appeals that "no evidence or information was proferred" to Judge Nettles "showing the report was prepared improperly." Judge Nettles had before him the Report, which showed that the entries for "Normalizing Adjustments" were left blank. Moreover, Petitioners argued that the Report was deficient in that it contained no normalizing adjustments and offered AICPA Standards, which Judge Nettles declined to consider. At a minimum, Petitioners showed

Respondents' salaries were excessive and some normalization adjustment was required.[11] Accordingly, the appraisal must be vacated and the Court of Appeals erred in upholding the trial court's refusal to do so.[12]

CONCLUSION

We find Appraiser violated the agreed-upon method in making the final valuation. Because the Report did not make any allowance for Respondent's excessive salaries, it failed to comply with the "income approach" by failing to "normalize" earnings of the corporation. Consequently, we reverse the decision of the Court of Appeals and remand the matter to the circuit court which should instruct Appraiser to conduct a new appraisal consonant with Judge Russo's order.

TOAL, C.J., BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

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[11] Respondents argue in support of the Court of Appeals opinion that Petitioners have not quantified the damages they seek to collect as they failed to offer evidence of the amount of salary reduction. We note that, in the e-mail response to Appraiser, Petitioners' counsel allowed that Appraiser "might" choose to value Carver's services, but made clear that Petitioners' position was that a $0 value was warranted under the facts as found by Judge Russo. Consequently, in our view, the burden of producing evidence setting a value on Respondents' services rested equally, if not entirely, with Respondents.

[12] It is possible that Appraiser did consider normalization but did not make normalizing adjustments because it considered Respondents' salaries appropriate. However, such a finding would directly contradict the findings of fact of Judge Russo, who found that the salaries were excessive. This position would also require that the appraisal be vacated.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Henry Lee Wilson, Respondent.

Appeal From Clarendon County
George C. James, Jr., Circuit Court Judge

Opinion No. 26823
Heard April 21, 2010 – Filed May 24, 2010

APPEAL DISMISSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor C. Kelly Jackson, of Sumter, for Appellant.

Deputy Chief Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE BEATTY: The State appeals from a circuit court order granting the defendant's motion for disqualification of an assistant solicitor. We hold an order granting a motion for disqualification of an assistant solicitor is an interlocutory order that is not directly appealable by the State, and we dismiss the appeal.

I.

The defendant in this case, Henry Lee Wilson, was charged with the murder of his ex-wife, Lucille Wilson, as well as one count each of first-degree burglary and possession of a firearm during the commission of a violent crime and three counts of assault with intent to kill.

An assistant solicitor in Clarendon County was assigned to prosecute the case. Defense counsel for Wilson moved to disqualify the individual assistant solicitor[1] based on the fact that the husband of the assistant solicitor had represented Wilson in his divorce from the murder victim just sixteen months before the alleged murder, and the brother-in-law of the assistant solicitor had represented Wilson at his bond hearing on the criminal charges.

The circuit court granted the motion for disqualification. The State appeals from this pretrial order, arguing the circuit court applied an incorrect legal standard in granting the motion for disqualification.

II.

"An appeal ordinarily may be pursued only after a party has obtained a final judgment." Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993); S.C. Code Ann. § 14-3-330(1) (1976); Rule 72, SCRCP; and Rule 201(a), SCACR).

[1] Defense counsel did not move to disqualify the entire solicitor's office.

"The right of appeal arises from and is controlled by statutory law." Id.; N.C. Fed. Sav. & Loan Ass' n v. Twin States Dev. Corp. , 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986).

"The determina tion of whether a party may immed iately appeal an order issued before or during trial is governed primarily by [section 14-3-330 of the South Carolina Code]." Hagood, 362 S.C. at 195, 607 S.E.2d at 708. "An order generally must fall into one of several categories set forth in that statute in order to be immediately appealable." Id.

Section 14-3-330 provides the following types of judgments, decrees, and orders are directly appealable:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions , brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions . . . ;
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action , (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
> (3) A final order affecting a substa ntial right made in any special proceeding or upon a summary application in any action after judgment; and
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330 (1977 & Supp. 2009) (emphasis added).

"The State may appeal a pretrial or der if the order is appealable under [section 14-3-330]." State v. Hill , 314 S.C. 330, 331, 444 S.E.2d 255, 256 (1994) (finding orders setting bail for each defendant in a capital murder case

were not appealable by the State because they "do not involve the merits, nor do the orders affect a substantial right which determines or discontinues the action"); cf. State v. McKnight, 287 S.C. 167, 337 S.E.2d 208 (1985) (concluding a pretrial order granting the suppression of evidence that significantly impaired the prosecution of the State's case could be directly appealed by the State under section 14-3-330(2)(a)).

In the current appeal, the disqualification order is not an order affecting the merits commenced in the court of common pleas or general sessions (subsection 1), it was not entered in a special proceeding (subsection 3), and it does not involve an injunction or a receiver in the court of common pleas (subsection 4), so the question arises as to whether the order falls within the ambit of subsection (2)(a), i.e., whether it is "[a]n order affecting a substantial right made in an action [and] . . . in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action . . ." S.C. Code Ann. § 14-3-330(2)(a) (1977).

The provisions of section 14-3-330, including subsection (2), have been narrowly construed, and the immediate appeal of orders issued before or during trial generally has not been permitted. Hagood, 362 S.C. at 196, 607 S.E.2d at 709. "Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial." Id.

In a case of first impression, this Court concluded in Hagood that an order disqualifying a party's attorney in a civil case is immediately appealable as it affects a substantial right—the right of a party to have counsel of his or her choosing—and could effectively determine the case because it bears upon the attorney/client relationship. Id. at 197-98, 607 S.E.2d at 710.

We explained, "An order affects a substantial right and is immediately appealable when it '(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action[.]' " Id. at 195, 607 S.E.2d at 709 (quoting S.C. Code Ann. § 14-3-330(2)).

After noting there is no clear majority view on the appealability of a disqualification order in a civil case,[2] we observed that the reasons most often cited for concluding such an order is immediately appealable "include (1) the importance of the party's right to counsel of his choice in an adversarial system; (2) the importance of the attorney-client relationship, which demands a confidential, trusting relationship that often develops over time; (3) the unfairness in requiring a party to pay another attorney to become familiar with a case and repeat preparatory actions already completed by the preferred attorney; and (4) an appeal after final judgment would not adequately protect a party's interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney." Id. at 197, 607 S.E.2d at 710.

We found this reasoning persuasive and "conclude[d] an order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed under Section 14-3-330(2)." Id. In reaching this conclusion, we reasoned the right to be represented by an attorney of one's choosing could, in effect, determine the action, and it is closely related to the right to a particular mode of trial, which is an established substantial right:

> Such an order implicitly falls within the statutory definition of a substantial right under Section 14-3-330(2)(a). The right to be represented by an attorney of [one's] choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case. Moreover, the right to be represented by [one's] preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right.

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[2] See generally David B. Harrison, Annotation, Appealability of State Court's Order Granting or Denying Motion to Disqualify Attorney, 5 A.L.R.4th 1251 (1981 & Supp. 2009).

> Deprivation of the right to [one's] preferred attorney would affect th e attorne y-client relationsh ip, which is extremely important in our adversarial system. Furthermore, an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests b ecause it would be difficult or impossible for the affected part y or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification.

Id. at 197-98, 607 S.E.2d at 710.

We hold the policy implications present in Hagood, i.e., the right of a party to retain counsel of his or her choosing and the development of an attorney/client relationship, are not co mpelling factors when considering th e disqualification of an assista nt solicitor. The reasons the Court articulated in Hagood as justification for allowing the direct appeal are not present here, as the State has no substantial right that ha s been invaded, and the State's ability to appeal has historically been limited in criminal matters.[3]

The appeals in which this Court has considered the issue of disqualification of either one solicitor or an entire solicitor's office have been appeals arising after the defendant's conviction, as they are in the posture of the defendant raising the issue as a ground for reversal. See, e.g., State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); State v. Chisolm, 312 S.C. 235,

[3] The denial of a disqualification motion is not dire ctly appealable as the ruling does not affect the merits or a party 's substantial rights, nor does it effe ctively determine the action, and any error in the fa ilure to grant the motion is more amenable to correction through the remedy of a new trial. Cf. Townsend v. Townsend, 323 S.C. 309, 312, 474 S.E.2d 424, 427 (1996) ("A denial of a m otion for dis qualification of a judge is an interlocutory order not affecting the merits and, thus, is reviewable only on appeal from a final order."); Rogers v. Wilki ns, 275 S.C. 28, 29-30, 267 S. E.2d 86, 87 (1980) (stating the denial of a motion for a pr esiding judge to disqualify himself is "generally treated as an interloc utory decision" and "[t]here is no statutory rem edy provided by our Code of Laws for t he direct appeal of this or der," and "hol d[ing] such or ders hereafter [are] reviewable only on appeal from final judgment").

439 S.E.2d 850 (1994); State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007), cert. denied (S.C. 2008). This is consistent with the general rule that a defendant may not appeal until after he is convicted and sentenced. See State v. Miller, 289 S.C. 426, 426, 346 S.E.2d 705, 705 (1986) ("In South Carolina, a criminal defendant may not appeal until sentence has been imposed."). We see no justification for extending different treatment to the State so as to allow direct appeal of this pretrial order.

III.

We conclude a pretrial order disqualifying a prosecuting attorney in a criminal case is not directly appealable by the State. Consequently, the State's appeal from the circuit court order disqualifying an individual assistant solicitor is dismissed.

APPEAL DISMISSED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur.
PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the result reached by the majority, but write separately to reaffirm my view that an order disqualifying an attorney is never immediately appealable. Hagood v. Sommerville, 362 S.C. 191, 607 S.E. 2d 707 (2005) (Pleicones, J., dissenting). I respectfully submit that policy does not provide a basis for construing S.C. Code Ann. § 14-3-330 (1976 & Supp. 2009) differently in an appeal that originates in the court of general sessions from one taken from the court of common pleas.

The Supreme Court of South Carolina

In the Matter of William
Grayson Ervin, Respondent.

ORDER

Respondent was suspended on May 11, 2010, for a period of six (6) months, retroactive to February 21, 2008. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

May 19, 2010