Circuit Court for Montgomery County
Case No. 485183V

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1192

September Term, 2022

TONETTE SIMMONS, ET AL.

v.

CALVIN T. ESTERS, II, ET AL.

Graeff,
Reed,
Friedman,

JJ.

Opinion by Graeff, J.

Filed: August 3, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

Appellees, Nza Esters and her husband, Calvin T. Esters, II, sued appellant, Tonette Simmons, and others, alleging a scheme to defraud appellees in relation to a home improvement project.[1] During trial, it was discovered that Ms. Simmons had not disclosed the existence of one of her bank accounts. The Circuit Court for Montgomery County ordered her to produce the account statements, declared a mistrial, and ordered Ms. Simmons and her attorney, Christopher Wampler, Esquire, also an appellant, to pay $300 and $1,000, respectively, to Ms. Esters.

On appeal, appellants present two questions for this Court's review,[2] which we have consolidated and rephrased slightly, as follows:

> Did the circuit court err in imposing monetary sanctions against Ms. Simmons and her attorney based upon a discovery failure?

For the reasons set forth below, we conclude that the sanctions order is not an immediately appealable interlocutory order, and therefore, we shall dismiss the appeal.

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[1] Nza Esters and her husband, Calvin T. Esters, II, did not file a brief in this Court. We shall refer to Ms. Esters and Mr. Esters, collectively, as appellees, and individually by name where appropriate.

[2] The questions presented by appellants are:

1. Whether the trial court's conclusion that Mr. Wampler and Ms. Simmons engaged in sanctionable conduct had factual support when the trial court acknowledged the validity of Mr. Wampler's argument, when there was no evidence that Del-One records were free, and when Ms. Simmons was never told she needed to be present at a status hearing.

2. Whether sanctions could be imposed on Mr. Wampler and Ms. Simmons when no authority expressly stated that a party had to pay for documents requested by their adversary, when no notice was given of a sanctions hearing, and when the trial court indicated that failure to obey the order could result in contempt.

FACTUAL AND PROCEDURAL BACKGROUND

Given our resolution of this appeal, we provide only a brief background. In March 2021, appellees filed suit against Ms. Simmons and four other defendants, asserting claims for violation of the Maryland Consumer Protection Act, breach of contract, fraud, and conspiracy to commit fraud. As to Ms. Simmons, the suit alleged that she conspired with two other defendants, James Lucas, her former fiancé, and Derrick Givens, an associate of Mr. Lucas, to defraud appellees relative to a home improvement contract for the renovation of their home. The other two defendants were a sham entity purportedly operated by Mr. Lucas, Aria Group, LLC ("Aria"), and a limited liability company operated by Mr. Givens, G-Man Contractors, LLC ("G-Man"). Appellees alleged that they paid Mr. Lucas more than $80,000, but the contract was not performed.

Mr. Lucas, Aria, and G-Man failed to plead, and the court entered default judgments against Mr. Lucas and G-Man in March and June 2022, respectively.[3] Trial proceeded against Mr. Givens and Ms. Simmons. The sole count against Ms. Simmons was conspiracy to defraud. Ms. Esters represented herself and Mr. Esters at trial, and Ms. Simmons was represented by Mr. Wampler.[4]

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[3] Although Mr. Lucas and Aria Group, LLC ("Aria") both were declared to be in default, the default judgment was entered solely against Mr. Lucas because Aria was not a real entity separate from him.

[4] Ms. Esters explained to the court that Mr. Esters could not appear because their son was ill. Appellees had been represented by counsel until five months prior to trial.

Ms. Esters called Ms. Simmons as her first witness. Ms. Simmons admitted to assisting Mr. Lucas with drafting documents, but she testified that she was not his business partner or employee and was not compensated in any way for her assistance to him.

Ms. Esters unsuccessfully sought to introduce into evidence Ms. Simmons' bank records. The court ruled that Ms. Esters had not laid a foundation for their admission, but it permitted Ms. Esters to question Ms. Simmons about her finances during the relevant period. During that line of questioning, Ms. Esters asked Ms. Simmons how many bank accounts she maintained. Ms. Simmons responded that she had "at least three" accounts: a savings account at Capital One, a checking account at M&T Bank, and an account with Del-One Federal Credit Union ("Del-One"). The Del-One account had been "open for years," but it did not contain "a lot of money." Following this testimony, Ms. Esters asked to approach the bench. Because the court was ready to recess for the day, it excused the jury and then heard from Ms. Esters.

Ms. Esters stated that Ms. Simmons had not produced in discovery records from her Del-One account, despite being asked to produce all her bank records for the period between May 2017 and June 2018. The court asked to see Ms. Esters' request for production of the bank statements. Although the relevant request for production is not in the record on appeal, the transcript reflects that the request sought all of Ms. Simmons' "savings account [statements], passbook statements, [and] checking account statements" from May 2017 through June 2018. Through counsel, Ms. Simmons responded to the request that the responsive documents were "attached."

Mr. Wampler advised the court that it was his understanding that there was "not a lot of money in this [account]," and the failure to produce the records had been an "oversight." He assured the court that they would produce the statements by the following day. The court directed appellants to try to get the records before the next morning and to email them to Ms. Esters so that she could review them. Depending upon whether the bank statements were relevant, the court would "entertain any motions that [Ms. Esters] ha[d] about it." The court then recessed for the day.

The next morning, the parties reconvened. Ms. Esters advised the court that she had not received the Del-One records. The court asked Mr. Wampler to explain why its directive that the documents be produced had not been followed. Mr. Wampler explained that the records were "not free," and although Ms. Simmons had attempted to get them, that was the reason they had not been produced. He took the position, citing *Pleasant v. Pleasant*, 97 Md. App. 711 (1993), that documents that are available to a party only upon the payment of a fee are not in the party's "possession, custody, or control" within the meaning of Maryland Rule 2-422(a), governing discovery of documents. He suggested that the proper way for appellees to obtain the bank records would have been to seek identification of Ms. Simmons' accounts through an interrogatory and then to subpoena them.

The court queried how the matter should proceed given that the records had not been produced and "one of the issues, in this case, is whether the defendant has received funds from the fraudulent scheme." Mr. Wampler replied that Ms. Simmons likely did not

produce the Del-One account statements because "we told her that if she could get them without having to pay for them, then she should produce them. That's the general directive my office gives to everyone."

Ms. Esters moved for a continuance, which the court explained was not feasible without declaring a mistrial, and for the court to reopen discovery. She also moved for sanctions. The court released the jury for the day and directed the parties to reconvene for a status conference by Zoom at 3:00 p.m. to determine if Ms. Simmons had been able to obtain the bank records and if there was any material information in those records. The court stated that it would hear Ms. Esters' motion for sanctions at the status conference.

The court reconvened remotely that afternoon. Ms. Esters and Mr. Wampler were present, but Ms. Simmons was not. Mr. Wampler explained that Ms. Simmons had driven to Seaford, Delaware, where Del-One was located, to obtain the bank statements, and she was on her way back to Montgomery County. Ms. Simmons had sent the records to Mr. Wampler, who had shared them with Ms. Esters.

Ms. Esters moved for a mistrial and to reopen discovery limited to the subject of Ms. Simmons' financial information. She also moved for sanctions against Mr. Wampler and Ms. Simmons, arguing that the case cited by Mr. Wampler, *Pleasant v. Pleasant*, supported her position that Ms. Simmons was obligated to produce her own bank records and that Mr. Wampler's admission that he advises his clients not to produce documents if they must pay a fee to obtain them was contrary to the law. She asked the court to order

Mr. Wampler to pay $1,000 and Ms. Simmons to pay $300, adding that the $1,300 could "go to the [c]ourt as it sees fit."

Mr. Wampler responded that Ms. Esters had not pointed to any information in the Del-One records that was relevant because the records revealed, as expected, that Ms. Simmons had very little money in the account and had made no large deposits during the relevant period. He suggested that Ms. Esters should have used discovery to trace the money paid to Mr. Lucas, which was deposited into an account that was not associated with Ms. Simmons.

With respect to the sanctions, Mr. Wampler disputed that he had made any misrepresentations to the court or to Ms. Esters, explaining that his response to her request for production of documents stated that Ms. Simmons would provide all documents in her "care or custody or control." He maintained that the Del-One records were not available on demand, and accordingly, they were not subject to production by Ms. Simmons. He proffered that Del-One charged a "research" fee. He cited *Klesch & Company v. Liberty Media Corporation*, 217 F.R.D. 517 (D. Colo. 2003), in support of his position that documents must be available "on demand" to be considered in the "possession, custody, or control" of a party. He asserted that his position was correct, or at least fairly debatable, and therefore, sanctions were not warranted.

Ms. Esters replied that Mr. Wampler had not produced any evidence that Ms. Simmons was charged for her Del-One bank records, and if her position was that she did not have to produce the documents because she was obligated to pay for them, she should

have objected to the request for production on that basis. Instead, Ms. Simmons "didn't mention the account at all" and "just waited to blindside [appellees] with it on the first day of trial."

The court ruled that the "crux of this case is fraudulent conduct and participation in a scheme to defraud" appellees, and relevant to that was whether Ms. Simmons "received from Mr. Lucas any of the funds paid by [appellees] and retained by Mr. Lucas." Ms. Simmons' position was that she did not need money from Mr. Lucas' scheme, and she did not receive any funds from him. She revealed during her testimony that she had a previously undisclosed bank account. Upon being directed to produce the records from that account, she was able to produce them in less than a day. Further, she advanced the argument, through counsel, that she was not obligated to produce the records "notwithstanding the lawful and timely, and very clear discovery request." She "offered no reasonable excuse for her failure to produce the records." The court was not confident that Ms. Simmons had produced all her records given that Mr. Wampler had advised her that she need not produce any records for which she was obligated to pay a fee. This amounted to "prejudicial conduct during the trial" that could not be cured "without giving Ms. Esters an opportunity to at least explore the discovery failure . . . [a]nd the possibility that there may be additional records." Consequently, the court granted Ms. Esters' motion for mistrial and her motion to reopen discovery for the limited purpose of seeking financial records for the relevant period. The court took the motion for sanctions under advisement.

Less than a week later, the court issued a sanctions order. It made the following pertinent findings:

- During Ms. Simmons' direct examination on the first day of the scheduled three-day trial, she revealed a previously undisclosed bank account.

- Whether Mr. Lucas compensated Ms. Simmons from the money paid to him by appellees was material to the claim against her.

- Appellees had "timely and properly requested" production of records of all savings and checking accounts maintained by Ms. Simmons.

- When the existence of the undisclosed account first was revealed, Mr. Wampler suggested that it was an oversight.

- Mr. Wampler did not communicate with the court prior to the following day, when the jury was recalled, to advise that Ms. Simmons was unable to obtain the records.

- Mr. Wampler then argued for the first time that Ms. Simmons was not obligated to produce the records "because they cost money" and stated that he "routinely advises" his clients as much.

- Mr. Wampler cited case law that did not support his position in this regard and the court was unaware of any case law or other authority supporting his position.

- When the court recessed a second time, it directed all parties to appear for a remote status conference at 3:00 p.m. that day.

- Ms. Simmons did not appear for the status conference.

- There was "no indication, or contention made, that securing the records cost money."

- Mr. Wampler was charging Ms. Simmons $300 per hour for his services.

The court further found that Mr. Wampler's position that Mr. Simmons was not obligated to produce her bank records if they cost money was "frivolous," as was his position that the Esters were obligated to seek identification of the accounts by interrogatory, rather than a request for production. The court found that Ms. Simmons and Mr. Wampler "lacked any acceptance of responsibility or acknowledgement of the failure to comply with the Maryland Rules," and this evidenced bad faith. It further found that the prejudice to Ms. Esters could not be cured during trial because she could not be assured that all the records had been produced.

In consideration of these findings, the prejudice to Ms. Esters, "the waste of judicial resources and time, the needless delay, the inconvenience to the citizens of Montgomery County, Maryland . . . , and the frivolous arguments of counsel and the admission of counsel that he routinely advises clients not to comply with the discovery rules if records cost money," the court granted the motion for sanctions. Its order provided:

> **ORDERED** that sanctions shall be imposed on Defendant's counsel, Mr. Christopher Wampler, in the amount of $1,000.00, which amount shall be paid to Plaintiff Nza Esters, within 10 days of this court's order; and it is further
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> **ORDERED** that if said amount is not paid to Plaintiff within 10 days of this court's order, Plaintiff may request that this court issue a Show Cause Order for Mr. Wampler to appear before this Court and show cause why he should not be held in contempt of this court, and Plaintiff may request that the award be reduced to judgment; and it is further
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> **ORDERED** that sanctions shall be imposed on Defendant, Tonette Simmons, in the amount of $300.00, which shall be paid to Plaintiff, Nza Esters, within 10 days of this court's order; and it is further

> **ORDERED** that if said amount is not paid to Plaintiff within 10 days of this court's order, Plaintiff may request that this court issue a Show Cause Order for Tonette Simmons to appear before this Court and show cause why she should not be held in contempt of this court, and Plaintiff may request that the award be reduced to judgment; and it is further
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> **ORDERED** that Plaintiffs oral motion to reopen discovery is **GRANTED**; and it is further
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> **ORDERED** that discovery shall be reopened for the sole purposes of allowing Plaintiff to secure Defendant's account information for the 2017-2018 time period requested in discovery, and allowing Plaintiff to conduct party and third-party discovery (including all forms allowed under the Maryland Rules) to obtain further information relating to the account transactions and information included in the account records . . . .

The court extended the discovery deadline until December 8, 2022 and scheduled a status conference for October 4, 2022.

Mr. Wampler and Ms. Simmons noted an immediate appeal from the sanctions order and posted a supersedeas bond.

While this case was pending on appeal, the case against Ms. Simmons and Mr. Givens was tried in May 2023. The jury returned a verdict in favor of appellees against Mr. Givens, awarding $143,500 in damages. It entered a verdict in favor of Ms. Simmons on the count against her for conspiracy to defraud. As of the filing of this opinion, no post-judgment motions or appeals were filed.

We shall include additional facts as necessary to our discussion.

DISCUSSION

As a threshold matter, we assess whether the sanctions order was immediately appealable. Appellate review generally is authorized only where a final judgment has been

entered. Md. Code Ann., Cts. & Jud. Proc. Art. ("CJ") § 12-301 (2020 Repl. Vol.). *Accord URS Corp. v. Fort Myer Constr. Corp*., 452 Md. 48, 65 (2017) ("As a general rule, under Maryland law, litigants may appeal only from what is known as a 'final judgment.'"). "To constitute a final judgment, a trial court's ruling 'must either decide and conclude the rights of the parties involved or deny a party the means to prosecute or defend rights and interests in the subject matter of the proceeding.'" *Md. Bd. of Physicians v. Geier*, 451 Md. 526, 545 (2017) (quoting *Harris v. State*, 420 Md. 300, 312 (2011)). A final order must "leave nothing more to be done in order to effectuate the court's disposition of the matter." *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989). If "'appellate jurisdiction is lacking, the appellate court will dismiss the appeal on its own motion.'" *Schuele v. Case Handyman & Remodeling Servs*., 412 Md. 555, 565 (2010) (quoting *Gruber v. Gruber*, 369 Md. 540, 546 (2002)).

In this case, when the appeal was noted, the case was still proceeding against Ms. Simmons and Mr. Givens, and therefore, the ruling was not a final judgment. Appellants do not dispute this, but they argue that this case falls within an exception to the general rule that an appeal is permitted only from a final judgment.

There are three exceptions to the CJ § 12-301 finality requirement: "appeals from interlocutory orders specifically allowed by statute; immediate appeals permitted under Maryland Rule 2-602; and appeals from interlocutory rulings allowed under the common law collateral order doctrine." *Salvagno v. Frew*, 388 Md. 605, 615 (2005). Appellants contend that the sanctions order was immediately appealable as to Mr. Wampler under the

collateral order doctrine and as to both Mr. Wampler and Ms. Simmons as an order for "the payment of money" under CJ § 12-303(3)(v). As explained below, we disagree. We conclude that the order was not immediately appealable, and therefore, we shall dismiss the appeal for lack of jurisdiction.

I.

Interlocutory Orders Appealable by Statute

CJ § 12-303 provides, in pertinent part, as follows:

> A party may appeal from any of the following interlocutory orders entered by a circuit court in a civil case:
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> * * *
>
> (3) An order:
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> * * *
>
> (v) For the sale, conveyance, or delivery of real or personal property or *the payment of money*, or the refusal to rescind or discharge such an order, unless the delivery or payment is directed to be made to a receiver appointed by the court.

(Emphasis added). Appellants contend that the order here is immediately appealable pursuant to CJ § 12-303 because it is an order for the payment of money.

In *Anthony Plumbing of Maryland, Inc. v. Attorney General*, 298 Md. 11, 20 (1983), the Supreme Court of Maryland explained that the history of CJ § 12-303 "indicates a legislative intent to allow interlocutory appeals only from those orders for the 'payment of

money' which had traditionally been rendered in equity."[5] Thus, the "types of orders previously held by this Court to be orders for the 'payment of money' are orders for alimony, child support, and related counsel fees." *Id.* (first citing *Chappell v. Chappell*, 86 Md. 532 (1898); and then citing *Pappas v. Pappas*, 787 Md. 455 (1980)). This Court also has "recognized the appealability of . . . an interlocutory order directing an assignee for the benefit of creditors to pay certain sums to creditors." *Id*. (citing *Genn v. CIT Corp*., 40 Md. App. 516 (1978)). The Supreme Court has observed that the "common thread in . . . cases [determining that an order was an appealable interlocutory order for the payment of money] is that each involves an order for a specific sum of money which 'proceeds directly to the person' and for which that individual is 'directly and personally answerable *to the court* in the event of noncompliance.'" *Id*. (quoting *Della Ratta v. Dixon*, 47 Md. App. 270, 285 (1980)). Such an order, unlike a "typical judgment at law," is '"immediately enforceable.'" *Id*. (quoting *Della Ratta*, 47 Md. App. at 286).

An order, such as the one here, requiring a party to pay money as a sanction typically has been determined to be one that is not equitable in nature and not appealable under CJ § 12-303. *Yamaner v. Orkin*, 310 Md. 321, 324–25 (1987); *Simmons v. Perkins*, 302 Md. 232, 235–36 (1985). Appellants contend, however, that it is an order for "the payment of money" under CJ § 12-303(3)(v) because it mandates the payment of money "under threat of contempt proceedings." The Supreme Court has rejected this type of contention. In

[5] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

Yamaner, 310 Md. at 324–25, the Court held that the imposition of sanctions against either an attorney or a party pursuant to Maryland Rule 1-341 was not an order for the payment of money under CJ § 12-303(3)(v) because the order was "not equitable in nature," it did "not proceed directly to the person so as to make one against whom it operates directly and personally answerable to the court for noncompliance," and it did not make "*available* to [the court] as a sanction for violation the sanction of imprisonment for contempt."[6] The order here is not an appealable order for the payment of money under CJ § 12-303(3)(v).

II.

Collateral Order Doctrine

Appellants contend that, even if the order is not a permissible interlocutory appeal pursuant to CJ § 12-303, the order with respect to Mr. Wampler is appealable under the collateral order doctrine. We disagree.

The collateral order doctrine is a "very narrow exception" to the final judgment rule, *Pittsburgh Corning Corp. v. James*, 353 Md. 657, 660 (1999), that "treats as final and appealable a limited class of orders which do not terminate the litigation in the trial court." *Pub. Serv. Comm'n of Md. v. Patuxent Valley Conservation League*, 300 Md. 200, 206 (1984). "Those orders have been deemed appealable under the collateral order doctrine because they are offshoots of the principal litigation in which they are issued.'" *Md. Bd.*

[6] If Ms. Esters were to attempt to invoke the court's contempt power and appellants were held in contempt, such an order would itself be immediately appealable. CJ § 12-304(a).

of Physicians v. Geier, 225 Md. App. 114, 130 (2015) (quoting *Montgomery County v. Stevens*, 337 Md. 471, 477 (1995)) (cleaned up).

"To qualify as a collateral order, a ruling must satisfy four criteria: '(1) it must conclusively determine the disputed question; (2) it must resolve an important issue; (3) it must be completely separate from the merits of the action; and (4) it must be effectively unreviewable on appeal from a final judgment.'" *Id.* at 131 (quoting *Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251, 285 (2009)). This test is not satisfied here because discovery sanctions orders are reviewable on appeal from a final judgment. *See, e.g.*, *St. Joseph Med. Ctr., Inc. v. Cardiac Surgery Assocs., P.A.*, 392 Md. 75, 87 (2006) ("It is firmly settled in Maryland that, except in one very unusual situation [not present here], interlocutory discovery orders do not meet the requirements of the collateral order doctrine and are not appealable under that doctrine.").

The case upon which Mr. Wampler relies, *Legal Aid Bureau, Inc. v. Farmer*, 74 Md. App. 707 (1988), does not persuade us otherwise. In that case, the circuit court, on appeal from judgments rendered by the District Court of Maryland, entered money judgments against counsel for tenants as sanctions under Rule 1-341 for taking the appeal in bad faith. *Id.* at 708. On appeal, this Court explained that, ordinarily, a party may take an appeal of right from a District Court judgment to the circuit court, but the party then has no subsequent appeal of right to this Court and must seek discretionary review in the Supreme Court. *Id*. at 709–10.

We discussed prior law providing that the imposition of sanctions generally could not be immediately appealed and must wait until final judgment:

> In *Simmons v. Perkins*, 302 Md. 232 (1985), the Court held that a judgment entered against a party under the Rule for filing a frivolous motion in the proceeding could not be immediately appealed under [CJ] § 12-303(3)(v) as an order for "the payment of money." In *Yamaner v. Orkin*, 310 Md. 321 (1987), the Court held that such a judgment was also not immediately appealable under the "collateral order doctrine." The principal basis for that conclusion was that a judgment under Rule 1-341 against a party to the underlying litigation "will almost always fail to meet [the] requirement" of the collateral order doctrine that "there be a serious risk of irreparable loss of the claimed right if appellate review is deferred until after final judgment." 310 Md. at 326. The notion, then, was that the award of attorneys' fees would, in fact, be reviewable in an appeal taken after the circuit court proceeding had been concluded.

Farmer, 74 Md. App. at 711.[7]

We held, nevertheless, that the judgment for sanctions against the lawyer was appealable to this Court because it was "sufficiently collateral to the underlying action" to fall within this Court's jurisdiction over appeals taken from final judgments entered by a circuit court. *Id.* at 712. We noted that, if a judgment for Rule 1-341 sanctions could not be directly appealed to this Court, "it may well be the only kind of money judgment for

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[7] In *Yamaner v. Orkin*, 310 Md. 321, 327 n.7 (1987), the Court declined to decide whether a "sanctions order which is directed to counsel" could be appealable under the collateral order doctrine, noting a split among the federal circuits under the parallel federal rule. That federal split was resolved by the United States Supreme Court in *Cunningham v. Hamilton County*, 527 U.S. 198, 204, 210 (1999), which held that monetary sanctions against an attorney for discovery violations under Federal Rule of Civil Procedure 37(b) did not fall within the collateral order exception to the requirement that appeals be taken from final judgments. The Court reasoned that the identity of interest between an attorney and his or her client counseled against treating attorneys like non-parties. *Id.* at 207.

which an appeal of right to some appellate court would not exist" because counsel would be "left solely to seeking discretionary review" in the Supreme Court. *Id*. at 713.

Farmer is distinguishable from the present case because the issue arose in the context of a final judgment. That case did not, as this case does, involve the appealability of an interlocutory order. Here, Mr. Wampler could raise this issue on a direct appeal after the final judgment. Accordingly, the order is not an interlocutory order that is appealable under the collateral order doctrine.

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANTS.