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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 22, 1997

Janet T. Butcher, General Counsel
South Carolina Department of Social Services
P. O. Box 1520
Columbia, South Carolina 29202-1520

Re: Informal Opinion

Dear Ms. Butcher:

You have asked whether Whitner v. State, Op. No. 24468 (July 15, 1996) "is binding on State agencies or the family courts at this time?" Your concern is that a Petition for Rehearing is pending before the State Supreme Court in this case and has been for some time and that Rule 221 of the South Carolina Rules of Appellate Procedure provides that "[i]f a petition for rehearing is received before the remittitur is sent, the remittitur shall not be sent pending disposition of the petition by the court."

Law / Analysis

In Whitner, the South Carolina Supreme Court addressed the question of whether "a viable fetus is a 'person' for purposes of the Children's Code." There, Whitner pled guilty to criminal child neglect, proscribed by S.C. Code Ann. § 20-7-50 (1985), for causing her baby to be born with cocaine metabolites in its system by reason of her ingestion of crack cocaine during the third trimester of pregnancy. In a petition for post-conviction relief, she contended that the Circuit Court lacked subject matter jurisdiction to take her plea because a viable fetus was not a "person" for purposes of § 20-7-50, which makes it a crime for a person with legal custody of a child or helpless person to neglect that person. On the other hand, the State contended that the statute "encompasses maternal acts endangering or likely to endanger the life, comfort, or health of a viable fetus." The trial court granted post-conviction relief, concluding that subject matter jurisdiction was lacking.

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The Supreme Court reversed. The Court noted that "South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges." Referencing its previous cases such as Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960) and Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964), the Court stated that "the concept of the viable fetus as a person vested with legal rights" is well established in this State.

The Court also cited State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984) which, unlike Hall and Fowler had involved criminal proceedings. In Horne, the defendant had stabbed his wife who was nine months pregnant, and the child died while still in the womb. In a unanimous decision, the Court concluded that it would be "grossly inconsistent ... to construe a viable fetus as a 'person' for the purpose of imposing civil liability while refusing to give it a similar classification in the criminal context." Thus, Horne held that "... an action for homicide may be maintained in the future when the State can prove beyond a reasonable doubt the fetus involved was viable, i.e. able to live separate and apart from its mother without the aid of artificial support." 319 S.E.2d at 704. The Horne case thus clearly set the stage for the Court's Whitner decision.

In Whitner, the Court held that a viable fetus is a "person" for purposes of § 20-7-50 as well. The Court left no doubt that its previous decisions in Hall, Fowler and Horne provided a strong foundation for its decision. Recognizing that it would make no sense to reach a different conclusion in light of previous precedents, the Court concluded:

> [i]f, as Whitner suggests we should, read Horne only as a vindication of the mother's interest in the life of her unborn child, there would be no basis for prosecuting a mother who kills her viable fetus by stabbing it, by shooting it, or by other such means, yet a third party could be prosecuted for the very same acts. We decline to read Horne in a way that insulates the mother from all culpability for harm to her viable child. Because the rationale underlying our body of law-protection of the viable fetus different from that underlying the law of Massachusetts, we decline to follow [the Massachusetts decisions]. (Emphasis added).

In short, Whitner was clearly decided on the basis of well-established law in South Carolina -- that a viable, unborn fetus is a "person" for purposes of the protections of the civil and criminal law.

Accordingly, in my view the fact that a petition for rehearing in the Whitner case remains pending does not change the law in South Carolina in this regard. Clearly, pursuant to Supreme Court Rule of Appellate Court Rules, the pendency of a petition for rehearing before the Court stays sending the remittitur to the lower court. And as you correctly recognize, and when the "final disposition of a case occurs when the remittitur is returned by the appellate court and filed in the lower court," is there a "final disposition of a case. ..." McDowell v. South Carolina Department of Social Services, 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989). Until then, the case is pending on appeal. Christy v. Christy, ____ S.C. ____, 452 S.E.2d 1 (Ct. App. 1994). Moreover, pursuant to Rule 220(a) SCACR, published opinions shall be sent to the official reporter and other reporters or printers, where a petition for rehearing has been filed "when the petition has been finally decided by the appellate court." Thus, in a technical sense, a case is still pending on appeal until the remittitur is sent to the lower court and filed. See also, 5 Am.Jur. 2d, Appellate Review, § 878 [a petition for rehearing suspends the finality of the court's judgment pending a determination of whether the judgment should be modified.]

That fact alone, however, does not resolve the issue of whether Whitner remains valid and binding for purposes of precedential value and as a binding judgment. The case of Wedbush, Noble, Cooke, Inc. v. Securities and Exchange Comm., 714 F.2d 923 (9th Cir. 1983) is highly instructive on this point. There, a plaintiff brought an action in the District Court seeking an injunction against continuation of an SEC investigation without notification to the plaintiff of the third-parties subpoenaed by the SEC. The District Court in issuing the injunction relied upon Jerry T. O'Brien, Inc. v. S.E.C., 704 F.2d 1065 (9th Cir. 1983). On appeal, the SEC attempted to avoid the impact of the O'Brien case "by arguing that O'Brien is not authoritative because its petition for rehearing (in O'Brien) stayed the mandate in that case ... ." The Ninth Circuit Court of Appeals rejected such argument. The reasoning of the Court was as follows:

> [t]he judgment of this court in O'Brien was entered on the court's docket on April 25, 1983 and the opinion was duly forwarded for publication. After receiving an extension of time the SEC filed a petition for rehearing and the mandate was stayed by the Clerk under Fed. R. App. P. 41(a) .... It does not follow, however, that the judgment of the court in that case is without effect. ...
>
> It is fundamental that the mere pendency of an appeal does not, in itself, disturb the finality of a judgment. See Hovey v. McDonald, 109 U.S. 150, 161, 3 S.Ct. 136, 143, 27 L.Ed. 888 (1883); 9 J. Moore, Federal Practice, ¶ 208.03 at

> 1407-08. Similarly, the pendency of a petition for rehearing does not, in itself, destroy the finality of an appellate court's judgment. See Deering Milliken, Inc. v. F.T.C., 647 F.2d 1124, 1128-29 (D.C. Cir. 1978); Amoco Oil Company v. Zarb, 402 F.Supp. 1001, 1008 (D.D.C. 1975). Thus, even though the mandate has not been issued in O'Brien, the judgment filed by the panel in that case on April 25, 1983 is nevertheless final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court.
>
> Accordingly, we find that the district court in this case correctly relied on O'Brien to conclude that Wedbush had demonstrated a likelihood of success on the merits for purposes of granting preliminary relief.

714 F.2d at 924. Such is consistent with the general rule recognized in a number of cases "[that] the pendency of a motion for a new trial does not preclude a judgment from operating as res judicata." 46 Am.Jur.2d Judgments §586. The mere fact that a party has made a motion to vacate a judgment and to grant a new trial or to modify a judgment or enter a new judgment does not deprive that judgment of its conclusive effect. Everson v. Everson, 431 A.2d 889 (Pa. 1981). See also, 9 A.L.R.2d 984, 1017, "Judgment as res judicata pending appeal or motion for a new trial during the time allowed therefor," § 12 ["In a number of cases it has been held that the pendency of a motion for a new trial does not preclude a judgment from operating as res judicata."].

Likewise, our courts have implicitly recognized that the pendency of a petition for reconsideration does not destroy the precedential effect of a decision because Whitner has already been cited by the Court of Appeals in several subsequent cases. See Lester v. S.C. Worker's Compensation Commission, Op. No. 2733 (Ct. App. October 6, 1997); City of Camden v. Brassell, ____ S.C. ____, 486 S.E.2d 492 (Ct. App. 1997); Stephens v. Avins Const. Co, ____ S.C. ____, 478 S.E.2d 74 (Ct. App. 1996).

Moreover, as emphasized above, the Court in Whitner relied upon longstanding South Carolina law. Fowler, Hall, and Horne have been the law of this State with respect to the point that a viable, unborn fetus is a "person" for some time. Accordingly, these cases must be accounted for notwithstanding the pendency of a petition for reconsideration in Whitner.

Thus, it is my opinion that Whitner remains binding precedent in South Carolina. This case cannot, nor should not be ignored. Unless and until the case is modified or

overturned, it is the law of this State. I strongly recommend that this authority be followed.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an