THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

R. Lawton McIntosh, Circuit Court Judge

Case number: 2020-CP-040-02439

APPELLATE CASE NUMBER: 2021-001206

U.S. Foods Inc., ... Respondent

v.

Carlees Restaurant LLC . . . . . Appellant

FINAL BRIEF OF RESPONDENT

July 1, 2022

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2. The portion of Appellant's appeal which focuses on the entry of a monetary judgment should be denied as interlocutory and remanded to the lower court for a ruling as to whether the inclusion of a monetary figure on the Form 4 was intentional or inadvertent. That ruling would then be appealable.
3. The circuit judge's Order Striking the Answer of Carlees Restaurant LLC and for Judgment which is the subject of this appeal, is not a final judgment on the merits as required by S.C. Code Ann. §14-3-330, and is interlocutory in nature and therefore the appeal should be dismissed.
4. The circuit judge's Order Striking the Answer of Carlees Restaurant LLC and for Judgment which is the subject of this appeal is procedural, not a ruling on the merits, and is not immediately appealable as required by S.C. Code Ann. §14-3-330. Appellant has failed to demonstrate an error of law or an abuse of discretion on the part of the circuit judge, and therefore the appeal should be dismissed.
5. The appeal of the circuit judge's ruling denying Appellant's Motion to Amend its Answer should be dismissed because precedent dictates that such an order is not immediately appealable pursuant to S.C. Code Ann. §14-3-330(2).

STATEMENT OF THE CASE

This is a lawsuit to collect a monetary balance owed on an account. US Foods, Inc. is a provider of restaurant supplies. Carlees Restaurant LLC was or is an entity operating one or more restaurants in Anderson County, South Carolina. Carlees Restaurant LLC opened an account with US Foods Inc. in 2017. When opening the account Ghassan Ashy signed a Credit Application on behalf of Carlees Restaurant LLC. (R. p. 26 -28). He also signed a Personal Guaranty document (R.p. 29). Both documents contain language allowing for the addition of interest on past due amounts and the payment of reasonable attorney fees should the account go into default for non-payment. Plaintiff alleges in good faith that as of September 29, 2018 the balance owed was $51,307.56. Between October 31, 2018 and March 1, 2020 Carlees Restaurant LLC and/or Ghassan Ashy made payments totaling $36,307.56. The last payment was drawn on the personal account of Ghassan Ashy and reduced the amount owed to $15,000.00. (R.p. 31)

On December 11, 2021, this lawsuit was filed in an effort to collect the remaining balance owed of $15,000.00. (R.p. 22-31) Attached to, and incorporated into the Complaint by reference, are the Credit Application and Personal Guaranty documents, a copy of the last payment check, an account statement, and an Affidavit verifying the amount owed; (R.p. 26-31)

March 18, 2021 Mr. Ashy was served by the Anderson County Sheriff as registered agent for Carlees Restaurant LLC, and individually as personal guarantor;

During the week of April 5, 2021 Plaintiff's attorney received a phone call from attorney Charles Anderson who said that he had not yet been retained by Mr. Ashy but was in discussion with him about possible representation. Emails were exchanged, and a fifteen day extension of time to Answer or otherwise plead, was granted to Mr. Anderson;

April 30, 2021 Attorney Anderson advised Plaintiff's attorney, via email, that Mr. Ashy had not retained him and he would not be representing the Defendants in the lawsuit. (This email is attached as an exhibit to Plaintiff's Motion to Strike the Answer of Defendant Carlees Restaurant LLC and for Default and Default Judgment) (R.p. 37);

May 4, 2021 Mr. Ashy filed two separate *pro se* Answers, one on his behalf individually, (R.p. 32) and one on behalf of Carlees Restaurant LLC. (R.p. 33) Both Answers were, for the most part, general denials which admitted the Plaintiff's allegations as to jurisdiction and venue and denied the remaining allegations of the Complaint without stating a reason for the denials or raising any specific defenses;

May 10, 2021 Plaintiff's Attorney mailed Ghassan Ashy a certified letter notifying him that as a non-attorney he was prohibited from representing Carlees Restaurant LLC in the lawsuit. (R.p. 39-40). This letter granted him an additional fifteen days to retain an attorney and included a warning that, if he did not retain an attorney to represent the corporation, Plaintiff would file a Motion to Strike the Answer of Carlees Restaurant LLC and for Default Judgment. Enclosed in the envelope was a copy of the Court of Appeals decision in the case of Traveler's Insurance

Company v. The Roof Doctor, 325 S.C. 614, 481 S.E.2d 451 (S.C. App. 1997). Mr. Ashy signed for the letter on May 25, 2021. (R.p. 42) (This letter is attached as an exhibit to Plaintiff's Motion to Strike the Answer of Defendant Carlees Restaurant LLC and for Default and Default Judgment)(R.p. 34-35).

July 2, 2021 Plaintiff filed a Motion to Strike the Answer and for Default and Default Judgment as to Carlees Restaurant LLC; (R.p. 34-42)

July 9, 2021 Plaintiff mailed a filed copy of Plaintiff's Motion to Strike the Answer of Carlees Restaurant LLC and for Default and Default Judgment to Ghassan Ashy;

July 29, 2021 Plaintiff mailed Ghassan Ashy a certified letter notifying him that Plaintiff's Motion to Strike the Answer of Carlees Restaurant LLC and for Default and Default Judgment was scheduled to be heard on August 25, 2021;

August 17, 2021 Attorney William N. Epps, III, acting on behalf of the Defendants, filed a Return to Plaintiff's Motion to Strike & For Default and Default Judgment and a Motion to Amend Defendants Answers; (R.p. 45-46)

August 25, 2021 Plaintiff's Motion to Strike the Answer of Defendant Carlees Restaurant LLC and for Default and Default Judgment was heard. Cynthia Lover, Attorney for the Plaintiff, William N. Epps, III, Attorney for the Defendants, and Defendant Ghassan Ashy, all attended the

hearing via Webex;

Plaintiff's written Motion to Strike the Answer of Defendant Carlees Restaurant LLC and for Default and Default Judgment (R.p. 34-40) contained a synopsis of the efforts made by Plaintiff's attorney to inspire Ghassan Ashy to retain an attorney prior to filing the Motion to Strike. These efforts were restated at the oral presentation of the motion, to the effect that it took the actual filing and scheduling of Plaintiff's Motion to inspire Mr. Ashy to comply with the court rules regarding the requirement that a corporate defendant be represented by an attorney in a Common Pleas case. (R.p. 55, p. 56, and p. 57, lines 1-17);

The judge questioned why Mr. Ashy had waited to retain an attorney until after the Plaintiff's Motion to Strike was filed and scheduled to be heard and Mr. Epps responded that Mr. Ashy thought it was not necessary for the corporation to have an attorney because it was dissolved. (R. p. 57, lines 23-25, R. p. 58, lines 1-20). The judge questioned, why, if Mr. Ashy had not believed it was necessary for the Defendant LLC to file an Answer, did he wait until the last minute to retain an Attorney and file a Motion to Amend his *pro se* Answer. (R. p. 57, lines 23-25, R. p. 58, lines 8 -10, 13-17);

The circuit Judge indicated that he thought the Defendant had been given plenty of time to retain an Attorney to file an Answer prior to the motion being filed and scheduled, granted Plaintiff's Motion to Strike the Answer of Carlees Restaurant LLC, and instructed Plaintiff's attorney to prepare an order. (R. p. 59, lines 11-19);

August 26, 2021 Plaintiff's attorney simultaneously emailed the circuit judge and the Defendants' attorney a proposed order which included language that, as a result of the Answer being stricken, there was no Answer on file for the corporate Defendant, and therefore that entity was in Default and the Plaintiff was entitled to a Default Judgment in the amount of $21,501.26; (R.p. 14 - 20)

August 27, 2021 at 7:11 a.m., Appellant's attorney sent a responsive email to Respondent's attorney and Judge McIntosh advising that he objected to the language in the proposed Order regarding entry of default judgment;. (R.p. 21)

August 27, 2021 at 8:42 a.m. the circuit judge filed a Form Order (R.p. 11) denying Defendant's Motion to Amend Defendants Answers which stated:

> "PLAINTIFF'S MOTION TO STRIKE AS TO CORPORATE DEFENDANT BASED ON NON-ATTORNEY FILING AN ANSWER ON BEHALF OF THE CORPORATION IS GRANTED. AS SUCH THERE IS NOTHING TO AMEND."

August 31, 2021 at 2:42 p.m. The judge's law clerk sent both attorneys an email stating: "Judge McIntosh has edited the order. It will be uploaded and signed." (R.p. 21)

September 1, 2021 The circuit judge e-filed the Order which is the subject of this appeal. (R.p. 1-7). This order was an edited version of the proposed order prepared by the Plaintiff. (R.p. 14-18). The edited Order set forth a Conclusion of Law that "A non-attorney is prohibited from representing an artificial entity, such as a corporation, in Common Pleas court." Traveler's Insurance Company, v. The Roof Doctor, 325 S.C. 614, 481 S.E.2d 451 (S.C. App. 1997) and

ruled that "The Answer submitted on behalf of the Defendant liability company by Ghassan Ashy, a non-attorney, is stricken as null and void." This Order removed the Default and Default Judgment language as well as the monetary amount from the body of the proposed order, however it did not remove the judgment amount of $21,501.26 from the Form 4 and a judgment in this amount was entered in the public records;

September 13, 2021 Defendants filed a Motion to Alter or Amend Order Striking Answer of Carlees Restaurant LLC; (R. p. 50-52).

September 15, 2021 the circuit judge filed a Form Order which reads as follows (R.p. 8-10):

> "DEFENDANT MOTION TO RECONSIDER IS DENIED WITHOUT THE NECESSITY OF A FORMAL HEARING. NO FORMAL ORDER REQUESTED UNLESS REQUESTED BY COUNSEL."

October 15, 2021 Appellant filed its Notice of Appeal;

(Respondent notes for the record that it does not appear that the Notice of Appeal was filed with the lower court as no record of the appeal appears on the public records for Anderson County Clerk of Court's website.)

FIRST STATEMENT OF ISSUE ON APPEAL

The circuit judge's ruling to strike the Answer filed on behalf of the Appellant by its non-attorney registered agent was the correct procedural ruling on an issue of law, upholding the ban on a non-attorney representing a corporate entity in a Common Pleas action, not a ruling on the merits of the Answer, and the Appellant has not demonstrated an abuse of discretion, or an error of law, therefore the appeal should be denied.

Standard of Review.

"The matter of striking from a pleading is largely within the discretion of the trial judge." Brown v. Coastal States Life Insurance Company, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975) "The grant of a Motion to Strike will not be reversed except for an abuse of discretion or unless the action of the trial judge was controlled by an error of law." *Id.* at 194-195, 728. Respondent's Motion to Strike the Answer of Carlees Restaurant LLC was made "pursuant to Rule 12(f) and Rule 55 of the South Carolina Rules of Civil Procedure and applicable case law." (See page 1 of Respondent's Motion filed July 2, 2021, R.p. 34). However, the Motion did not contain any additional references to SCRCP Rules 12(f) and 55 and cited only one case, Traveler's Insurance Company, v. The Roof Doctor, 325 S.C. 614, 481 S.E.2d 451 (S.C. App. 1997). This case sets forth the proposition that:

> "A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys"

and includes citations from State v. Wells 191 S.C. 468, 5 S.E.2d 181 (1939) and Unauthorized

Practice of Law Rules 309 S.C. 304, 422 S.E.2d 123 (1992).

Argument:

It is assumed that in preparing for the Motion hearing, the circuit judge reviewed the pleadings in the court's file, however a review of the hearing transcript shows that the circuit judge did not mention the content of the Defendant's Answer failing to raise a meritorious defense or consider such a SCRCP Rule 12(f) argument or analysis, but focused solely on the delay by Carlees Restaurant LLC in retaining an attorney until after Respondent's Motion to Strike was filed and scheduled to be heard. (See the hearing Transcript, R.p. 57, lines 2-5, 23-25, R.p. 58 lines 1-17, R.p. 59, lines 11-19). The last two sentences of the Order being appealed state:

> 3. A non-attorney is prohibited from representing an artificial entity, such as a corporation, in Common Pleas court. Traveler's Insurance Company, v. The Roof Doctor, 325 S.C. 614, 481 S.E.2d 451 (S.C. App. 1997).
>
> 4. The Answer submitted on behalf of the Defendant liability company by Ghassan Ashy, a non-attorney, is stricken as null and void.

As, the circuit judge did not rule on the merits of the Appellant's *pro se* Answer one way or the other, before striking it, therefore his decision is deemed to be procedural in nature. The Appellant posits that the correct analysis of the judge's decision is a Rule 12(b)(6) analysis. A SCRCP Rule 12(b)(6) analysis is based on an analysis of the merits of the pleading in question. The circuit judge's decision in the case at bar did not address the merits of Appellant's Answer, therefore, Respondent argues that a 12(b)(6) standard of review is incorrect and Appellant's appeal should be denied.

Instead, Respondent argues that the circuit judge's ruling was a procedural ruling based on a matter of law, i.e., the representation of an artificial entity by a non-attorney in Common

Pleas court which is prohibited by law. This position is supported by the circuit judges ruling in the August 27, 2021 Form Order (R.p. 11) which states:

> "PLAINTIFF'S MOTION TO STRIKE AS TO CORPORATE DEFENDANT BASED ON NON-ATTORNEY FILING AN ANSWER ON BEHALF OF THE CORPORATION IS GRANTED. AS SUCH THERE IS NOTHING TO AMEND."

This ruling is clearly procedural as it does not address the contents of the Appellant's *pro se* Answer.

The Appellant had multiple opportunities to retain an attorney before Respondent's motion to strike was filed and scheduled but ignored them, these opportunities were all set forth in Plaintiff's Motion and the exhibits thereto. One can only assume that the circuit judge reviewed the case history and decided that the Appellant should not be rewarded for ignoring court rules and granted Appellant's motion to strike. The circuit judge's ruling was not an abuse of discretion and was not an error of law. Further, Appellant's appeal centers around a 12(b)(6) analysis on deficient pleadings. As this was not the proper analysis of the circuit judge's ruling, Respondent argues that Appellant failed to establish that the circuit judge committed an abuse of discretion or an error of law and therefore Appellant's appeal should be dismissed.

(With regards to the fact that the clerk enrolled the judgment as a monetary judgment, please see Respondents Second Issue on Appeal and the discussion relating to correcting a clerical error in a judgment.)

SECOND STATEMENT OF ISSUE ON APPEAL

The portion of Appellants Appeal which focuses on the entry of a monetary judgment on the public records should be denied as interlocutory and remanded to the lower court for a ruling clarifying whether the inclusion of the monetary figure on the Form 4 was intentional or inadvertent, *e.g.*, a Rule 60, SCRCP, Motion to Correct a Clerical Error. A ruling on such a motion would then be appealable.

Standard of Review.

"By definition, a clerical error is a mistake in writing or copying, and as applied to judgments and decrees, it is a mistake or omission by a clerk, counsel, judge or printer which is not the result of of exercise of judicial function. Dion v. Ravenel, Eiserhardt Association, 316 S.C. 226, 230, 449 S.E.2d 251, 353 (Ct. App 1994)). One way to correct a clerical error is by filing a Motion for Relief from Judgment or Order pursuant to Rule 60 of the South Carolina Rules of Civil Procedure "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, leave to correct the mistake must be obtained from the appellate court. The ending of a term of court or departure from the circuit shall not operate to deprive the trial judge of jurisdiction to correct such mistakes." Rule 60(a), SCRCP, Relief from Judgment or Order. Respondent has been unable to find a case directly on point where the body of a judgment is silent as to a monetary amount but a money judgment is set forth in the corresponding Form 4, however, cases addressing similar issues as to what types of decision are

appealable are found in Winesett v. Winesett, 287 S.C. 332, 338 S.E.2d 340 (1985) (A default judgment may not be appealed to this Court. The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), an appeal may then be taken from the denial of the motion), and Ex Parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986) (An order directing a party or a non-party to submit to discovery is not immediately appealable, instead the party or non-party must be held in contempt before an appeal may be taken challenging the validity of the discovery order).

Argument:

On August 25, 2021 the circuit judge heard the parties' Motions and partially granted Plaintiff's Motion to Strike the Answer of Carlees Restaurant LLC and for Default and Default Judgment, in that he struck the Answer of Carlees Restaurant LLC, but declined to enter Default and Default Judgment against that entity, and instructed Respondent's counsel to prepare a formal order, (R. p. 59, lines 11-19). Respondent's attorney prepared an order she thought was appropriate, however Appellant objected to the finding of a monetary judgment. The circuit judge edited the proposed order and removed the finding of judgment for the Plaintiff and monetary damages from the body of the proposed order. However, the dollar amount was not removed from the Form 4 portion of the Order and the clerk of court entered judgment on the public records in the amount specified in the Form 4. (Compare the Proposed Order, (R.p. 14-17) to the Order Striking Answer of Carlees Restaurant LLC and for Judgment filed on September 1, 2021.(R.p. 1-4))

On September 13, 2021 Appellant filed a Motion to Alter or Amend Order Striking Answer of Carlees Restaurant LLC, pursuant to Rules 52(b) and Rule 59(e) SCRCP. (R.p. 50-

52). The Appellant's written motion included language addressing the circuit judge's removal of the language regarding default and default judgment and requested "that the Court Amend its Order removing the judgment contained in the Form 4 against the Defendant Carlees Restaurant LLC."

On September 15, 2021, the judge denied Appellants' motion without an oral hearing, via a Form Order (R.p. 8), which contained the following language:

> "DEFENDANT MOTION TO RECONSIDER IS DENIED WITHOUT THE NECESSITY OF A FORMAL HEARING. NO FORMAL ORDER REQUESTED UNLESS REQUESTED BY COUNSEL."

It is unclear to either party whether the circuit judge intentionally left the dollar amount in the Form 4 when he removed the monetary language from the proposed order or whether the dollar amount in the Form 4 was left there inadvertently. However, Respondent disputes that filing an appeal was the proper way to obtain an answer to this question and argues that, as indicated in the Form Order denying Defendants Motion to Alter or Amend, the Appellant could have requested a formal hearing and asked for clarification on the judge's ruling. Without a clarification as to the judge's basis for his decision, there is no issue preserved for appeal. When deciding issues on appeal, the appellate courts are confined to the record. Timms v. Timms, 286 S.C. 291, 294, 333 S.E.2d 74, 75 (Ct. App. 1985). The record on this issue is silent as there was no discussion of a monetary judgment in the transcript of the August 25, 2021 hearing, (R. p. 55-59) and the ruling on Appellant's subsequent Motion to Alter or Amend that Order is also silent. (R.p. 8).

On one hand it is possible that the circuit judge meant to leave the dollar figure in the

Form 4, and the issue is not preserved for appeal, therefore the appeal should be denied, and the judgment stands.

On the other hand, it is possible that the inclusion of the dollar figure in the Form 4 may have been inadvertent, as the Appellant suggests in its appeal. Respondent argues that the proper way to clarify the issue is not via appeal, but by asking the judge to hold a formal hearing on Appellant's Motion to Alter or Amend or by filing of a Rule 60(a) Motion to Correct a Clerical Mistake. Either motion would force the circuit judge to clarify the issue of whether the inclusion of the dollar amount on the Form 4 was intentional or inadvertent, and his ruling on that order could then be properly appealed.

Therefore, to the extent that Appellant's current appeal focuses on the dollar amount in the Form 4, Respondent believes the appeal is premature and should be dismissed as interlocutory and the case remanded for further action by the Appellant and clarification by the hearing judge. Once the judge issues a specific ruling as to whether the September 1, Order Striking Answer and for Judgment should have included a dollar amount, or whether such dollar amount was included in error, that order will then be ripe for appeal.

THIRD STATEMENT OF ISSUE ON APPEAL

The circuit judge's Order Striking the Answer of Carlees Restaurant LLC and for Judgment (R. p. 1-4) which is the subject of this appeal, is not a final judgment on the merits as required by S.C. Code Ann. §14-3-330 and is interlocutory in nature and therefore the appeal should be dismissed.

Standard of Review

The controlling statute with regards to the time for an appeal is South Carolina Code Section 14-3-330 which reads:

"The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

> (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; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (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; . . ."

With regards to case law interpreting S.C. Code Ann 14-3-330(1), an interlocutory judgment is not appealable, only a final judgment is appealable. ("An appeal ordinarily may be pursued only after a party has obtained a final judgment." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005)). If a judgment leaves some further act to be done by the court before the rights of the parties are determined the judgment is not final. Culbertson v. Clemens, 322 S.C. 20, 471

S.E.2d 163 (1996). If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment. Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335,426 S.E.2d 777, 780 (1993.)

Argument:

Under South Carolina Code Section 14-3-330(1) the Order being appealed from (R.p. 1-4) is not a final order and is not dispositive of the case, *i.e.*, it does not involve a ruling on the merits of the Appellant's Answer, does not award final judgment to either party (overlooking what appears to be a clerical error by the clerk of court in enrolling the judgment for a dollar amount against Carlees Restaurant LLC), and does not fully adjudicate the case, it only strikes the *pro se* Answer of one Defendant, Carlees Restaurant LLC, and does not award judgment in favor of the Respondent.

If Appellant had not filed this Appeal, Respondent would have moved for a damage hearing or a Motion for Judgment on the Pleadings, in an effort to arrive at an entry of judgment against one or both Defendants. Once a Final Order of Judgment had been entered, that would have been the time for the appeal to be filed.

As the Order being appealed from is not a final order, Respondent argues that Appellant's appeal is interlocutory pursuant to SC Code Section 14-3-330(1) and the appeal should therefore be dismissed.

FOURTH STATEMENT OF ISSUE ON APPEAL

The circuit judge's Order Striking the Answer of Carlees Restaurant LLC and for Judgment, (R. p. 1-4) which is the subject of this appeal, is procedural, not a ruling on the merits, and is not immediately appealable as required by S.C. Code Ann. §14-3-330(2). Appellant has failed to demonstrate an error of law, or an abuse of discretion on the part of the circuit judge, and therefore the appeal should be dismissed.

Standard of Review

Section 14-3-330 of the South Carolina Code (2017) addresses appellate jurisdiction and the appealability of a ruling and provides in part:

"The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

> (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; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (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; . . ."

With regards to case law interpreting S.C. Code Ann 14-3-330(1), only a final judgment is appealable. ("An appeal ordinarily may be pursued only after a party has obtained a final judgment." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005)). If a judgment leaves some further act to be done by the court before the rights of the parties are determined the

judgment is not final. Culbertson v. Clemens, 322 S.C. 20, 471 S.E.2d 163 (1996). *Id.* If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment. Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335,426 S.E.2d 777, 780 (1993). An exception to this rule being that even a judgment which is not a final judgment may be appealed pursuant to South Carolina Code Section 14-3-330(2), which allows an appeal of "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." However, "the use of the word "strike" in both Rule12(f) SCRCP and section 14-3-330(2)(c) does not mean that an order granting a Rule 12(f) motion is automatically appealable." Thornton v. South Carolina Electric & Gas Corp., 391 S.C. 297, 302, 705 S.E.2d, 475, 478 (Ct. App. 2011). "An appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c)"; "Whether an order granting a Rule 12(f) motion to strike is appealable under section 14-3-330(2)(c) depends on the effect of the individual order under the facts and circumstances of the case." Jefferson v. Gene's Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988).

Argument:

The circuit judge's ruling in the Order being appealed from (R.p. 1-4) was based on Appellant's failure to retain an attorney in a timely manner and not on the merits of the Appellant's *pro se* Answer, therefore, as the Order being appealed from is procedural in nature, Appellant's appeal should be dismissed as interlocutory.

The Appellate courts have differentiated cases where a pleading was stricken on a procedural basis rather than a ruling on the merits of the claims made in the pleadings. ("We hold

that the order is not appealable under subsection (2)(c) since it does not strike the answer, but refuses to allow its filing. Again, this decision does not relate to the merits of the answer." *Id.*, 318, 456. In the case of Baldwin Construction Co. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004), the circuit court denied a motion to file an amended answer and the South Carolina Supreme Court held that the denial was not immediately appealable because the court did not strike a pleading on its merits but refused to allow its filing.

An analysis of the Transcript of Hearing (R. p. 55-59) and the resulting Order Striking Answer of Carlees Restaurant LLC and for Judgment (R. p. 1-4) indicates that the circuit judge's ruling was procedural in nature, based solely on the fact that the Appellant had failed to timely retain an attorney, and not the merits of the Appellant's Answer. Therefore, Appellant's argument that the judge's decision was in error using a Rule 12(b)(6) analysis fails, as this analysis by its nature considers the merits set forth on the face of the pleading in question, and its appeal should be dismissed. (The Appellant's *pro se* Answer was in the clerk's file and it is possible that, while preparing for the hearing, the trial judge reviewed the Answer and saw that it contained no meritorious defenses and this played into his ruling, however, the hearing transcript is silent on this point).

In summary, the granting of an appeal of an order striking a pleading is not automatic. Instead, case law indicates that the appellate court should differentiate between whether the ruling being appealed was made on a procedural ground or on the merits of the arguments raised in the pleading in question. As the judge in the case at bar based his decision on a strictly procedural basis, Appellant's appeal should be dismissed as interlocutory.

FIFTH STATEMENT OF ISSUE ON APPEAL

The appeal of the circuit judge's ruling denying Appellant's Motion to Amend its Answer (R.p. 11) should be dismissed because precedent dictates that an Order Denying a Motion to Amend a Pleading is not immediately appealable.

Standard of Review

South Carolina Rule of Civil Procedure Rule 15(a) addresses the time frame and procedure for a party to follow when it seeks to amending its answer. Section 14-3-330 of the South Carolina Code (2017) addresses the appealability of a denial of a Motion to Amend an Answer and provides in part: "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

> (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; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (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; . . ."

Prior orders of the appellate courts ruling on issues presented under this statute have held that: Intermediate orders involving the merits may be immediately appealed pursuant to subsection 14-3-330(1), and define an order "involving the merits" as one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." Mid-State

Distributors, Inc., v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (quoting Knowles v. Standard Savings. & Loan Association, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979)). Interlocutory orders affecting a substantial right may be immediately appealed pursuant to subsection 14-3-330(2). Orders affecting a substantial right "discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." Mid-State Distributors., Inc., 310 S.C. at 334 n.4, 426 S.E.2d at 780 n.4. A denial of a Motion to Amend an Answer is not immediately appealable, but is interlocutory in nature. Baldwin Construction Company v. Graham, 357 S.C. 227, 593 S.E.2d 146 (S.C. 2004), A party whose motion to amend its answer is denied, must wait until a final judgment has been entered. *Id.*

Argument:

In the case at bar, the circuit judge issued the following ruling on Appellant's Motion to Amend or Alter its Answer: "PLAINTIFF'S MOTION TO STRIKE AS TO THE CORPORATE DEFENDANT . . . IS GRANTED, AS SUCH THERE IS NOTHING TO AMEND." (August 27, 2021, Form Order. (R.p.11)) Plaintiff's Motion to Strike was filed first, heard first, and granted. Once the Motion to Strike was granted, there was no answer to amend. Respondent agrees that the circuit judge's conclusion was logical and was a procedural decision, and was not a ruling addressed to the merits of the proposed amended answer.

Whether one agrees or disagrees with how the circuit judge reached his decision, as per the cases cited hereinabove, the law is clear on the issue of when such a denial of a motion to amend an answer may be appealed, and that is after a final judgment is entered. "Petitioners have not "arrived at the end of the road" and will be able to appeal the decision after the trial is finished." Baldwin Construction Company v Graham, 357 S.C. 227, 230, 593 S.E.2d 146, 147

(S.C. 2004), citing Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993). Therefore, Appellant argues that the portion of Appellant's appeal addressing the denial of its Motion to Amend its Answer should be dismissed as interlocutory.

CONCLUSION

Appellant's appeal consists of two questions combined into one. The first question being whether the circuit judge erred in entering the Order Striking Answer of Carlees Restaurant LLC and for Judgment, and the second whether the circuit judge erred in denying Appellant's Motion to Alter or Amend its Answer.

Respondent believes that Appellant's appeal as to whether the circuit judge erred in entering the the Order Striking Answer of Carlees Restaurant LLC and for Judgment should be dismissed or multiple grounds, detailed hereinabove.

While, of course, the law is the issue in this appeal, I would like to take this opportunity to provide some additional perspective. My practice is focused largely on the collection of commercial debt. I represent creditors and file lawsuits throughout the entire state. In my experience it is not uncommon for the principal of a company to submit an answer on behalf of their corporations, sometimes they mail me a letter and don't file it, sometimes they do file it. I always treat that communication as a responsive pleading that must be brought to the attention of the court in some manner. It used to be that I would file a Motion to Strike the Answer and then attend the motion hearing, which often involved hours of travel. Sometimes the Defendant would appear and ask the judge to give him more time to retain an attorney. The judge would agree and give the Defendant somewhere between ten and thirty days to retain an attorney and continue my motion. Then, when the Defendant failed to comply, I would have to reschedule my motion and travel back to attend another hearing, where ultimately my motion would be granted. Depending on the court's caseload and scheduling practices this process could delay the entry of judgments for several months. During that time I was (and am) always concerned that a Defendant might

transfer real property to protect it from a potential judgment lien. I became so frustrated with this two- hearing process that I decided before filing a motion, I would give Defendants the additional extension of time which was usually granted by the hearing judge. I penned a form letter to explain the requirement that a corporation must be represented by an attorney and, in case they think I am trying to shmoo them, I provide them with a succinct and easy-to-understand version of the law, which is the one-page ruling in Traveler's Insurance Company v. The Roof Doctor, with the important language highlighted. This is the letter I mailed Ghassan Ashy on May 10, 2021, (R.p. 39-40). This process of my sending a letter before filing a motion has worked well, most Defendants either retain an attorney or do not contest my motion to strike their *pro se* answers.

In the case at bar, the Defendant had many bites at the apple before this appeal was filed. As indicated by the payments made, Mr. Ashy acknowledged that there was a balance due owed, when he quit making the payments and he was served with the lawsuit, he consulted with an experienced attorney, Chuck Anderson, who I gave an extension of time to file an Answer on the Defendants behalf. However, Mr. Ashy did not retain Attorney Anderson. (R. p. 37). Instead, he filed his *pro se* Answers. (R.p. 32-33). By letter of May 10, 2021, I offered to give Mr. Ashy additional time to retain an attorney. (R.p. 39). He did not do so. Until Carlees Restaurant LLC was represented by an attorney I could not move the case against that entity forward, the law is clear, a non-attorney cannot represent a corporation in a legal action filed in Common Pleas court, so I could not serve Mr. Ashy with discovery directed at Carlees Restaurant LLC and expect him to respond, nor could I expect him to participate in mediation. At some point in time, I think it is inevitable that we would end up in front of a circuit court judge who would want to know why

the corporation was not represented by an attorney. Therefore I filed the Motion to Strike the *pro se* Answer Mr. Ashy filed on behalf of Carleees Restaurant LLC, (R.p. 34-35) and mailed him a copy of the filed motion, but he still did not retain an attorney until he was notified that the hearing was scheduled to be heard.

Maybe he had another reason or motive for not retaining an attorney, but from my perspective the Defendant's actions are an attempt to delay the litigation process. And I realize that striking a pleading is a drastic step, but when a party is made aware of a rule and given multiple opportunities to bring himself or his company into compliance with the rule, and fails to do so, there should be consequences. Therefore, I believe that the decision of the trial judge to grant the Plaintiff's Motion was not an abuse of discretion, was a correct decision of law, and his ruling should be upheld, and Defendant's appeal should be dismissed.

July 1, 2022

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUL 05 2022
SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

R. Lawton McIntosh, Circuit Court Judge

Case number: 2020-CP-04002439

APPELLATE CASE NUMBER: 2021-001206

U.S. Foods Inc., ... Respondent
v.
Carlees Restaurant LLC . . . . . Appellant

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR and the Supreme Court's August 25, 2021, order specifying the reduced number of copies required in Appellate Matters (copy attached). In making this certification, the attorney for the Respondent notes that the following typographical errors were corrected: in one instance the word "Defendant" in the initial brief was changed to "Plaintiff" in the Final Brief, the word "answer"in the initial brief was changed to "motion" in the Final Brief, and the number $46,307.56 in the initial brief was changed to $36,307.56 in the Final Brief. Absent these corrections, the sentences and amounts containing these words and figures were non-sensical.

July 1, 2022

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Court News ...

2021-08-25-03

The Supreme Court of South Carolina

Re: Reduced Number of Copies Required in Appellate Matters

Appellate Case No. 2020-000447

ORDER

(a) Purpose. Rule 267(f) of the South Carolina Appellate Court Rules (SCACR) allows this Court by order to reduce the number of copies to be filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals (hereinafter "Appellate Courts"). This order implements this provision.

(b) Reduction of Copies to Be Filed; Covers. Unless otherwise ordered or requested by the Appellate Court, a document filed with an Appellate Court need not be accompanied by any additional copies. If submitted in paper, the document shall be submitted unbound and unstapled. Further, as an exception to Rule 267(e), SCACR, the covers of all briefs, whether submitted in paper or electronically, may be white unless additional copies are requested under (d) below.

(c) Filing of the Appendix under Rule 242, SCACR. In cases seeking review of a decision of the Court of Appeals, Rule 242, SCACR, requires the petitioner to file two copies of an Appendix. This requirement is suspended. Instead, the necessary documents to comprise the Appendix will be obtained from the electronic records of the case before the Court of Appeals.

(d) Request for Additional Copies. In the event the Appellate Court determines that additional copies are needed, they will be requested from the lawyer or party submitting the document. These additional copies must comply with any binding or cover color requirements specified by Rule 267, SCACR.

s/Donald W. Beatty C.J.

s/John W. Kittredge J.

s/Kaye G. Hearn J.

s/John Cannon Few J.

s/George C. James, Jr. J.

Columbia, South Carolina
August 25, 2021