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**Nov 07 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Hon. L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2022-001470  
Case No. 2019-CP-40-05221

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Alicia Pearson, ..... Respondent

v.

Richland County, ..... Appellant

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RESPONDENT’S REPLY TO APPELLANT’S RETURN IN OPPOSITION TO  
RESPONDENT’S MOTION TO DISMISS APPEAL

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Pursuant to SCAR 240, Respondent Alicia Pearson, by and through her undersigned counsel, hereby submits this Reply to Appellant’s Return in Opposition to Respondent’s Motion to Dismiss Appeal, filed by Appellant on October 31, 2022.

BACKGROUND

Appellant’s interlocutory Appeal arises from two orders issued by the lower court in this matter: an order partially denying Appellant’s Motion to Transfer to a Non-Jury Docket, filed September 28, 2022, and an order denying Defendant’s Motion for Summary Judgment, also filed September 28, 2022. On October 18, 2022, Appellant filed a Notice of Appeal and copies of both Motions with this Court, requesting an appeal of both Motions.

On October 20, 2022, Respondent filed a Motion to Dismiss Appellant’s Appeal for Lack of Jurisdiction, noting that a denial of summary judgment is not immediately appealable. In response, Appellant filed a Return in Opposition to Respondent’s Motion to Dismiss Appeal on October 31, 2022. In its Return, Appellant claims that it only seeks to appeal the denial of the Motion for Transfer to a Non-jury Docket. This is not the case. Appellant’s Notice of Appeal clearly references the lower court’s order denying its Motion for Summary Judgment. After initially denying appealing the lower court’s denial of summary judgment, Appellant contradicts itself, stating it “*chose to appeal both orders*” to this Court (Appellant’s Return at 4 (emphasis added)).

Therefore, in the interest of judicial economy, and to avoid unnecessary delay, Respondent submits this reply, and asks that the Court dismiss Appellant’s appeal of the lower court’s Order Denying Appellant’s Motion for Summary Judgment, or alternatively, take judicial notice that Appellant’s appeal of said Order and the issues therein, to the extent that it is not a final order, is not properly before this Court, and will not be considered at this time.

#### LEGAL STANDARD

“An appellate court may determine the question of appealability of a decision from a lower court as a matter of law.” *S.C. Dept. of Health and Human Servs. v. Manor-York*, No. 21-ALJ-08-0221-AP (SCALC July 5, 2022) (quoting *Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 379, 762 S.E.2d 44, 47 (Ct. App. 2014)). “Before an order can support an appeal, it must be a final judgment. The issue of whether a judgment is final is jurisdictional, which means that if the reviewing court determines that the judgment appealed from is not final, that court is obligated to dismiss the appeal on its own motion.” *Id.* (internal citations omitted); *see also Doe v. Howe*, 362

S.C. 212, 216; 607 S.E.2d 354, 355 (Ct. App. 2004) (“A fundamental rule of appellate procedure is that a judgment or order must usually be final before it can be appealed.”).

#### ANALYSIS

“In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court.” *Queen's Grant v. Greenwood Dev.*, 628 S.E.2d 902, 919; 368 S.C. 342 (S.C. App. 2006) (quoting *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004)). These issue preservation rules both “give the trial court a fair opportunity to rule on the issues,” and “provide [the appellate court] with a platform for meaningful appellate review.” *Id.* An Appellant who disregards the need for a final judgment asks the appellate court to “serve as a trial court in finding facts based upon the record as submitted.” *Id.*

Appellant has attempted to circumvent not only the trial court but also the jury in its role as the finder of fact, by inappropriately appealing the Order Denying its Motion for Summary Judgment in conjunction with the Order Denying its Motion for Transfer to a Non-Jury Docket. In *Queen's Grant v. Greenwood Development*, the Defendant appealed the circuit court's denial of its motion for summary judgment. The appellate court refused to entertain this interlocutory appeal, noting that [Defendant's] arguments [were] not properly before [the] court because the circuit court [had] yet to rule on them.” *Id.* Because a denial of summary judgment was not a decision on the merits, the appellate court lacked the jurisdiction to hear the matter until the trial court had rendered its decision. *See also McLendon v. S.C. Dep't of Highways and Pub. Transp.*, 313 S.C. 525, 526 n. 2, 443 S.E.2d 539, 540 n. 2 (1994) (noting that the denial of a motion for summary judgment “is not directly appealable.”) Likewise, as the trial court has yet to issue a final decision on the merits in this case, Appellant's Appeal of the Order Denying its Motion for Summary Judgment is premature and should be dismissed.

Appellant suggests that because the lower court's Order Denying its Motion to Transfer to a Non-Jury Docket affects a "substantial right" as described in S.C. Code § 14-3-330(2) and "there is an overlap" between this order and the Order Denying its Motion for Summary Judgment, that this Court should ignore appellate procedure and allow Appellant to appeal both Motions, regardless of whether both are immediately appealable. (*See* Appellant's Return at 4).

Specifically, Appellant notes that, "[o]rders affecting the mode of trial affect a substantial right as defined in section 14-3-330(2) of the South Carolina Code (1976), and must, therefore, be appealed immediately." *Frampton v. South Carolina Dept. of Transportation*, 406 S.C. 377, 752 S.E.2d 269, 274 (Ct. App. 2013). *See also Foggie v. CSX Transportation, Inc.*, 313 S.C. 98, 431 S.E.2d 587, 591 (1993) ("[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable"). In *Frampton*, the Court found that the Appellant had failed to preserve any issue regarding mode of trial for its review, because it failed to appeal the trial court's initial order at the time the order was made. 752 S.E.2d at 274.

Respondent acknowledges the precedent relied upon by Appellant; indeed, *Frampton's* holding appears applicable in this matter. Respondent does not deny that in select instances, an immediate appeal is appropriate. However, Appellant cannot attempt to cloak its inappropriate appeal of one order with an otherwise seemingly legitimate appeal of the other. The trial court's denial of summary judgment is not a final order, and therefore cannot be appealed until ruled upon by the lower court.

As noted before, Appellant states that Respondent "incorrectly assumes that the Appellant Richland County is appealing from the denial of its Motion for Summary Judgment," yet in the same filing notes that it appealed the denial of its Motion for Summary Judgment to preserve its

sovereign immunity defense. (Appellant's Return at 1). In doing so, Appellant has also appealed denial of summary judgment with respect to Respondent's Breach of Contract, Promissory Estoppel, and Whistleblower Retaliation claims. It appears that Appellant seeks to mislead this court in order to circumvent the finder of fact in this case and deprive Respondent of her right to a trial in any form. This should not be permitted. This Court need not entertain Appellant's erroneous appeal of the trial court's Order Denying Appellant's Motion for Summary Judgment, as its ruling on the Order Denying Appellant's Motion to Transfer to a Non-Jury Docket is determinative on the issue of sovereign immunity.

#### CONCLUSION

For the reasons stated herein, Respondent respectfully requests this Court dismiss Appellant's appeal of the lower court's Order Denying Appellant's Motion for Summary Judgment, or alternatively, take judicial notice that Appellant's appeal of said Order and the issues therein, to the extent that it is not a final order, is not properly before this Court, and will not be considered at this time.

Respectfully submitted,

GIST LAW FIRM, PA

/s Donald Gist

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*Attorneys for Respondent*

November 7, 2022

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APPEAL FROM RICHLAND COUNTY  
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Appellate Case No. 2022-001470  
Case No. 2019-CP-40-05221

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Alicia Pearson, .....

Respondent

v.

Richland County, .....

Appellant

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CERTIFICATE OF SERVICE

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Pursuant to Section (d)(1) of the Supreme Court’s Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Gist Law Firm, P.A., counsel for the Respondent, does hereby certify that service of the RESPONDENT’S REPLY TO APPELLANT’S RETURN IN OPPOSITION TO RESPONDENT’S MOTION TO DISMISS APPEAL in the above-captioned matter was made upon all counsel of record by email only this 7th day of November 2022 as follows:

Andrew F. Lindemann, Esquire  
Lindemann & Davis, P.A.  
Email: [andrew@ldlawsc.com](mailto:andrew@ldlawsc.com)

*Erica McCrea*

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Erica McCrea  
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November 7, 2022

**VIA S.C. COURTS E-FILING**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629 Columbia, SC 29211  
ctappfilings@sccourts.org

RE: *Alicia Pearson v. Richland County, South Carolina*  
Civil Action Number: 2019-CP-40-5221  
Appellate Case No. 2022-001470

Dear Ms. Kitchings:

Pursuant to Section (b)(2) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), please find enclosed for filing Respondent's Reply to Appellant's Return in Opposition to Respondent's Motion to Dismiss Appeal in the above referenced matter.

By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (d)(1) of the same Supreme Court Order. A check for the filing fee will be mailed to the Court by U.S. Mail.

Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely yours,

*Erica McCrea*

Erica McCrea

Encl.: Respondent's Reply to Appellant's Return in Opposition to Respondent's Motion to Dismiss Appeal

C: File  
Donald Gist, Esq.  
Andrew F. Lindemann, Esq.