

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

11701

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No.: 2014-000601

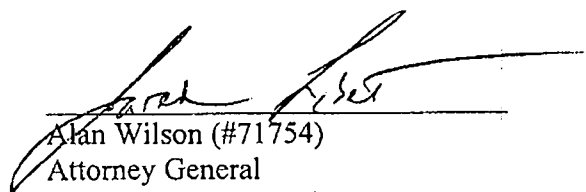
State of South Carolina, ex rel. Alan Wilson
In his official capacity as Attorney General
For the State of South Carolina, Respondent,

v.

Cephalon, Inc., Appellant.

Motion to Dismiss Appeal and Supporting Memorandum of Law

March 26, 2014


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SC Court of Appeals



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Alan Wilson, in his capacity as Attorney General of the State of South Carolina, respectfully moves the Court to dismiss the appeal of Cephalon, Inc.

I. Background

Cephalon, Inc. is a pharmaceutical company based in Pennsylvania that manufactures and markets prescription drugs including Actiq, Provigil, and Gabitril. On June 2, 2011 the State of South Carolina brought suit against Cephalon for violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 (1976), *et seq.*, and equitable remedies for alleged unfair and deceptive marketing of these drugs in South Carolina. On February 13, 2012, the State amended its Complaint to include a claim for damages on behalf of the State Health Plan for excess prescriptions written for these drugs resulting from Cephalon's unfair and deceptive marketing practices. By agreement of the parties and pursuant to a scheduling order entered by the court, discovery was initially limited to Cephalon's statute of limitations and laches defenses. If Cephalon's motion for summary judgment on those grounds was denied, discovery on the merits would then follow and the case would proceed to trial.

Following oral argument, on February 21, 2014, Judge DeAndrea Gist Benjamin issued an order denying Cephalon's motion for summary judgment on the grounds of the statute of limitations and laches. Thereafter, Cephalon did not file a motion to reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. On March 14, 2014, the Attorney General served merits discovery on Cephalon. Four days later, Cephalon filed a Notice of Appeal of Judge Benjamin's order denying summary judgment and requested that the discovery be stayed while the appeal is pending.

II. Orders Denying Summary Judgment Are Not Appealable

The law in South Carolina is settled; orders denying summary judgment are not appealable. In 2003, the South Carolina Supreme Court unequivocally held that “the denial of summary judgment is not appealable, even after final judgment.” Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003). Indeed, “the denial of summary judgment does not *finally* determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings.” Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) (emphasis in original). The issues raised in the motion for summary judgment may be raised again by a motion to reconsider the order or by a motion for directed verdict. Id. (citing Johnston v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (1993); Weil v. Weil, 299 S.C. 84, 382 S.E.2d 471 (Ct.App.1989); PPG Industries v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176, 375 S.E.2d 331 (Ct.App.1988); 21 C.J.S. *Courts*, § 149, p. 183 (1990)).

In Davis v. Tripp, 338 S.C. 226, 525 S.E.2d 528 (Ct.App.1999), this Court held that an order denying summary judgment on statute of limitations grounds was not appealable. In Davis, this court recognized that while issues relating to subject matter jurisdiction may be raised at any time, a statute of limitations defense does not raise a question of subject matter jurisdiction. Id. at 530. Similarly, this court again held that an order denying a “motion for summary judgment on the statute of limitations is not appealable *under any circumstance*.” Thornton v. South Carolina Electric & Gas Corp., 391 S.C. 297, 300-01, 705 S.E.2d 475, 477 (Ct.App.2011) (emphasis added).

While Cephalon may argue that Judge Benjamin's order is appealable because it had the effect of granting summary judgment on Cephalon's statute of limitations and laches defenses, such an argument is incorrect as a matter of law. *See Thornton*, 391 S.C. at 307, 705 S.E.2d at 475 ("The order is also not appealable as having granted summary judgment . . . the order does not grant summary judgment on the issue, and the question of whether the Thorntons complied with the statute of limitations remains one the circuit court must answer at trial.") The South Carolina Supreme Court has made it clear that an order denying summary judgment is not a final determination of any issues raised in the motion nor does it have the effect of striking any defense. *See Ballenger*, supra. Likewise, the Court recognized that "[a] defendant can bring a subsequent summary judgment motion after his first motion has been denied." *Blyth v. Marcus*, 335 S.C. 363, 366 517 S.E.2d 433, 434. A denial of summary judgment is an interlocutory order which the trial judge can reconsider until the end of trial. *Id.*

The law on this issue is clear and well settled. Judge Benjamin's order denying Cephalon's motion for summary judgment is not final and does not preclude Cephalon from raising the issues again at any time before the end of the trial. The denial of a motion for summary judgment is not reviewable even after a trial of the case on the merits. *Silverman v. Campbell*, 326 S.C. 208, 486 S.E.2d 1 (1997), *Raino v. Goodyear Tire & Rubber Co.*, 309 S.C. 255, 422 S.E. 2d 98 (1992).

As such, the order denying summary judgment is not appealable and Cephalon's appeal should be dismissed.

III. Conclusion

Based on the foregoing reasons, the Attorney General respectfully asks the Court to dismiss the appeal of Cephalon, Inc.

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For the State of South Carolina,Respondent,

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Proof of Service

I certify that I have served the Motion to Dismiss Appeal and Supporting
Memorandum of Law on Cephalon, Inc. by depositing a copy of it in the United States
Mail, postage prepaid on March 26, 2014, addressed to its Attorneys of record:

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