THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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.

Respondent's Reply in Support of Motion to Dismiss Appeal

April 10, 2014

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Alan Wilson, in his capacity as Attorney General of the State of South Carolina, respectfully submits this Reply in support of his motion to dismiss the appeal of Cephalon, Inc.

I. Cephalon's Appeal Should Be Dismissed

Cephalon devotes nearly seven pages of its Return to a recitation of facts and arguments relating to the substance of its motion for summary judgment and wholly immaterial to the issue before this Court. Cephalon attaches as exhibits to its Return the transcript from the hearing on the motion for summary judgment, its memorandum in support of its motion for summary judgment, the State's opposition brief, and its reply brief. None of these exhibits have any bearing on the issue before the Court. The only issue before the Court is whether an order denying summary judgment is appealable. The controlling law in South Carolina is that it is not. The applicable authority was fully set forth in the Attorney General's motion to dismiss and, in the interest of brevity, will not be repeated here.

Cephalon asserts that its appeal is proper under both S.C. Code Ann. § 14-3-330(1) and § 14-3-330(2). Cephalon is mistaken. With regard to its argument under §14-3-330(2), Cephalon relies on the second footnote in *Ex parte Farm Bureau Mut. Ins. Co. v. Koontz*, 314 S.C. 487, 431 S.E.2d 252 (1993) for the proposition that an order denying summary judgment that has the effect of striking a portion of an Answer is appealable.[1] Cephalon fails to mention, however, that the South Carolina Supreme Court expressly overruled *Ex parte Farm Bureau* for that specific proposition. In *Ballenger v. Bowen*, 316 S.C. 476, 443 S.E.2d 379 (1994), the Court addressed an appeal from an order denying summary judgment. In *Ballenger*, as here, the appellant relied

[1] Cephalon also relies on *Menezes v. WL Ross & Co. LLC*, 392 S.C. 584, 709 S.E.2d 114 (Ct. App. 2011), a case where the trial judge granted a motion to dismiss counterclaims and affirmatively struck the Appellants' defenses related to whether the action was barred by a settlement agreement and release. The order in *Menezes*, unlike the order here, was a final order that precluded Appellants from raising those defenses later in the proceeding.

on footnote two from *Ex parte Farm Bureau*. There, as here, the appellant argued that statements made in the order denying summary judgment had the effect of striking their defenses. The Supreme Court disagreed, and noted, at the outset, that it had repeatedly held that denial of summary judgment is not directly appealable. *Id.* at 380. The Court then addressed the very argument Cephalon makes here when it wrote that "[a] denial of a motion for summary judgment decides nothing about there merits of the case, but simply decides that the case should go to trial." *Id.* Furthermore, the denial of summary judgment "does not have the effect of striking any defense since that defense may be raised again later in the proceedings." *Id.*; *see also Thornton v. South Carolina Electric & Gas Corp.*, 391 S.C. 297, 307, 705 S.E.2d 475, 481 (Ct. App. 2011) (rejecting argument that order denying summary judgment for one party was appealable as having actually granted summary judgment for the other party).

Accordingly, Judge Benjamin's order neither expressly nor implicitly struck any defense Cephalon raised in its Answer. Even after Judge Benjamin's order denying summary judgment, Cephalon is not prohibited from raising those defenses "in later proceedings by a motion to reconsider or by a motion for a directed verdict." *Id.* As such, S.C. Code Ann. § 14-3-330(2)(c) is inapplicable and Cephalon's reliance on it is misplaced.

Similarly, this appeal is not authorized by S.C. Code Ann. § 14-3-330(1). Judge Benjamin's order does not "***finally*** determine some substantial matter forming the whole or a part of some cause of action or defense." *See Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006) (emphasis added). The phrase "involving the merits" has been narrowly construed. *Id.* As noted above, the arguments raised by Cephalon in the present appeal have not been finally determined and Cephalon retains the ability to raise them at trial. *See*

Thornton, 391 S.C. at 307, 705 S.E.2d at 481 ("[T]he question of whether the [plaintiffs] complied with the statute of limitations remains one the circuit court must answer at trial.").

The Court of Appeals' recent decision in *Watson v. Underwood*, 2014 WL 1047096, __ S.C. __, __ S.E.2d __ (Ct. App. Mar. 19, 2014), squarely rejects the argument raised by Cephalon. In that case, Watson argued that "the circuit court erred in denying her motion for summary judgment regarding when a deed purports to transfer her property to a trust rather than to the trustees." *Id.* at *5. The court first reiterated that orders denying summary judgment are not appealable because they do not "finally determine anything about the merits or strike a defense." *Id.* The court then addressed the issue that the circuit judge, in denying the summary judgment motion, made conclusions of law:

> Because the denial of a motion for summary judgment cannot be appealed, we cannot consider this issue. We note that Watson is not bound by the circuit court's conclusions of law on this issue and can raise the issue again at trial.

Id. Cephalon presents the same argument here: Judge Benjamin, in denying its motion for summary judgment, made conclusions of law with regard to Cephalon's statute of limitations defense. Assuming, *arguendo*, the veracity of that statement, *Watson* makes clear that Cephalon is not bound by any such conclusions of law and can raise these same statute of limitations arguments as defenses at trial. The current appeal is premature and inappropriate.

Finally, Cephalon's argument that this Court should review the entirety of Judge Benjamin's ruling is fatally flawed, as it presupposes that some part of this order is immediately appealable. For the reasons discussed above, the denial of Cephalon's motion for summary judgment is interlocutory and not appealable in part or in its entirety.

II. Conclusion

Based on the foregoing reasons and for the reasons set forth in his motion to dismiss, the Attorney General respectfully asks the Court to dismiss the appeal of Cephalon, Inc.

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Proof of Service

I certify that I have served the Reply in Support of Motion to Dismiss Appeal on Cephalon, Inc. by depositing a copy of it in the United States Mail, postage prepaid on April 10, 2014, addressed to its Attorneys of record:

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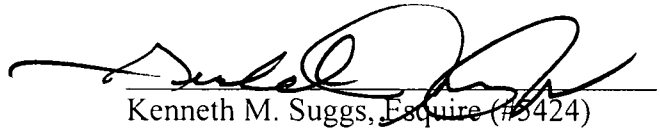

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