THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2012-CP-07-01366

Kimberlee Tavino, individually
and as Personal Representative
of the Estate of Betty Jane Jackson,
and Catherine Springfield, ... Appellants,

v.

Christine Scheriff and Frank Scheriff, ... Respondents.

RETURN TO MOTION TO DISMISS APPEAL

Pursuant to Rule 240(e), SCACR, Appellants provide the Court with the following Return to the Motion to Dismiss Appeal filed by Respondents. The Court should deny Respondents' motion to dismiss and permit this appeal to move forward.

Respondents concede the trial court's order *grants* partial summary judgment (Memorandum, p. 6), but they assert the order is not appealable for several reasons. Appellants will address each in the order Respondents present them.

I. The Lack of Circuit Court Certification of the Matter Pursuant to Rule 54(b), SCRCP, Does Not Affect Appealability (Motion, p. 2; Memorandum, pp. 6-7)

Appeals in South Carolina are governed by statute, not rule. *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) ("The right of appeal arises from and is controlled by statutory law."). The main statute governing appealability is Section 14-3-330 of the South Carolina Code, which provides:

> 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;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330 (1976). Thus, it is this Code section that controls whether the order in this case may be immediately appealed, not Rule 54(b), SCRCP.

Respondents cite to *Lebovitz v. Mudd*, 289 S.C. 476, 478, 347 S.E.2d 94, 95

(1986) and assert "absent certification, an order is not final, and therefore is [not] subject to review at any time before final judgment on all claims." (Memorandum, p. 7). The Respondents failed to include the following language the Supreme Court added in *Link*: "Lack of Rule 54(b) certification, however, does not preclude immediate appeal of an order which is directly appealable under S.C. Code Ann. § 14-3-330 (1976)." *Lebovitz*, 289 S.C. at 478, 347 S.E.2d at 95. Furthermore, the *holding* of *Lebovitz* was that the order in that case granting a motion pursuant to Rule 12(b), SCRCP, as to one of multiple claims *was* directly appealable under § 14-3-330(2) "because it affects a substantial right and strikes out part of a pleading." *Lebovitz*, 289 S.C. at 479, 347 S.E.2d at 95.

Respondents then cite to *Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990) for the rule that "[o]orders granting partial summary judgment may be immediately appealable under either the 'involving the merits' or 'substantial right' categories of § 14-3-330(1) and 2(c)." (Memorandum, p. 8). The order appealed in *Link* was an interlocutory order granting partial summary judgment on one of several claims. Link did not immediately appeal the order but waited until the end of the case to appeal that one ruling. The School District argued Link waived the issue by not immediately appealing, and Link argued the lack of Rule 54(b) certification relieved him of the need to appeal. The Supreme Court held *both* parties were wrong because appellate practice in South Carolina is governed by § 14-3-330, not Rule 54.

Respondents also failed to point out in their memorandum that the Supreme Court made the following observation in *Link*:

> In *Lebovitz v. Mudd*, 289 S.C. 476, 347 S.E.2d 94 (1986), this

> Court held that an order which is immediately appealable by statute is not rendered unappealable because it has not been certified under Rule 54(b). In *Lebovitz*, the appellants wished to immediately appeal the granting of a 12(b)(6), SCRCP, motion to dismiss, which struck one of their causes of action. The respondents in *Lebovitz* countered that, since there had been no certification of the 12(b)(6) ruling as "final" by the trial judge, Rule 54(b) barred an immediate appeal. We held that such was not the case, since the appellants had a statutory right to immediately appeal. This is the same conclusion reached by the federal courts under their Rule 54(b). 10 Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d, § 2658 at pp. 71-72 (1983) (Rule 54(b) should not be construed to alter federal appellate jurisdiction or supersede or modify the other means by which a party can secure a review of a trial court determination).

Link, 302 S.C. at 4-5, 393 S.E.2d at 177-178. The Court stated that "Link's argument that lack of certification prevented the grant of summary judgment from being immediately appealable *is without merit*." *Link*, 302 S.C. at 5, 393 S.E.2d at 178 (emphasis added).

Importantly, the Court noted:

> This Court has not had occasion to address the effect of granting a Rule 54(b) certification on appealability. Until the adoption of the South Carolina Rules of Civil Procedure, "final judgment" was a term of art denoting the disposition of all issues in the action. *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884). This is the definition which has traditionally been applied to the term "final judgment" in § 14-3-330(1). Rule 54(b) certification purports to alter the definition of "final judgment" by allowing a final judgment to be entered on certain claims before disposition of the entire case. Until this Court determines whether granting certification mandates an immediate appeal, the safer course is to immediately appeal any order certified under Rule 54(b).

Link, 302 S.C. at 5 n. 3, 393 S.E.2d at 178 n. 3. *See also Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010) (discussing *Link* and Rule 54(b), and concluding that, to date, Rule 54(b) certification merely permits an appellate court to know that no possibility of revision of the order exists).

Appellants are aware of this Court's decision in *Thornton v. SCE&G Corp.*, 391

S.C. 297, 705 S.E.2d 475 (Ct. App. 2011). It appears the discussion in *Thornton* largely forms the basis for the memorandum Respondents filed with their motion. The order in *Thornton* effectively denied class certification, which our Supreme Court has held is not immediately appealable. *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 448, 661 S.E.2d 81, 85 (2008). As for the part of the order in *Thornton* that held there was no private right of action under the Mining Act, the Court noted "[t]his appeal ... presents the unique situation in which the trial court granted summary judgment as to a cause of action the Thorntons never pled." The Court stated "because the Thorntons never asserted a cause of action under the Mining Act, the order does not have the effect of removing any material issues from the case, and therefore does not affect a substantial right by striking a pleading." *Thornton*, 391 S.C. at 307, 705 S.E.2d at 480. *Thornton* is therefore distinct from this case in a meaningful way.

Additionally, insofar as *Thornton* may be construed in a manner that is contrary to *Link* and *Lebovitz*, it cannot control here. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App.2012) (recognizing the court of appeals is bound by the decisions of the supreme court).

The lack of Rule 54 certification is irrelevant to appealability. The Court should reject Respondents' argument to the contrary.

II. The Order is Appealable under Section 14-3-330 (Motion p. 2; Memorandum pp. 7-12)

The order on appeal in this case grants partial summary judgment as to several causes of action pled in the complaint – it is therefore immediately appealable. *See Nauful v. Milligan*, 258 S.C. 139, 143, 187 S.E.2d 511, 513 (1972) (an order granting a motion for partial summary judgment is immediately appealable under § 14-3-330).

The grant of summary judgment, even if only as to some issues in the case, is an adjudication on the merits. *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("[s]ummary judgment is an adjudication on the merits of the case"). As such, the grant of summary judgment is an order that "involves the merits." S.C. Code Ann. § 14-3-330(1). As the Supreme Court stated in *Link*:

> While we agree that the order granting summary judgment may be appealable under § 14-3-330(2)(c) because it has the effect of striking out a pleading, the order is also appealable under § 14-3-330(1) as "involving merits." *Nauful v. Milligan*, 258 S.C. 139, 187 S.E.2d 511 (1972); *Cf. Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988) (an order "involves the merits" when it finally determines "some substantial matter forming the whole or a part of some cause of action or defense ..."). A summary judgment ruling, as well as a 12(b)(6) dismissal, fits within this *Jefferson* definition. Section 14-3-330(1) allows a party to wait until final judgment to appeal intermediate orders "necessarily affecting the judgment not before appealed from." We have long ago held that the phrase "necessarily affecting the judgment" has the equivalent meaning as the phrase "involving the merits," and that the legislature meant to use these phrases interchangeably. *Blakely & Copeland v. Frazier*, 11 S.C. 122 (1878). Hence, Link was entitled here, under § 14-3-330(1), to wait until final judgment to appeal the summary judgment ruling against him.

Link, 302 S.C. at 6, 393 S.E.2d at 179.

Respondents did not alert this Court about *Thornton*, *Nauful*, *Baird* or the

operative language in *Link.* The reason is obvious – these controlling authorities stand in direct force against the arguments Respondents are making here. The Court should not be persuaded to ignore these cases so as to dismiss this appeal. The order in this case is immediately appealable. Section 14-3-330 says so, as does the Supreme Court.

Respondents cite to *Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004) for the apparent rule that this order granting partial summary judgment is not immediately appealable because "appellants 'have not' 'arrived at the end of the road' and [would] be able to appeal the decision after the trial [wa]s finished.'" (Memorandum, p. 8). *Baldwin*, however, involved the appeal from an order denying the defendant's motion to file an amended answer, which the Supreme Court has held is not immediately appealable. The Court noted the order did not rule on substance, nor did it strike a pleading – rather, it refused to allow its filing. *Baldwin* does not control here, where the order clearly addresses the merits and strikes out several claims from the pleadings.

Respondents cite to *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942) for the rule that "if the question involved will be inherent in the final judgment and can be presented in an appeal from that judgment, it will be treated as an interlocutory order, review of which can only be had upon the general appeal." (Memorandum, p. 8). This cite is deceptive here. In *Good*, something happened during the trial (not described in the opinion) that caused the judge to grant a mistrial. A defendant, Maryland Casualty Company, took an immediate appeal, raising issues regarding the admissibility of evidence. The Supreme Court dismissed the appeal, noting

that:

> Under the foregoing circumstances in which the Court discharged the jury before the case was ever placed with it for determination, many of the Court's rulings were necessarily tentative, and subject to such other motions as might later be made, such as motions to strike testimony from the record, and motions to eliminate such testimony from the consideration of the jury, and could thus have no possible finality.

Good, 201 S.C. at 36, 21 S.E.2d at 210. The Court then noted its decision was controlled by the rule from *Floyd v. Page*, 124 S.C. 400, 402, 117 S.E. 409 (1923): ""The effect of the mistrial was to leave the parties litigant in statu quo ante, with the cause still pending for trial in the circuit court. The rulings of the trial judge in the court below having eventuated in no binding adjudication of the rights of the parties, the appeal is prematurely brought, and jurisdiction thereof may not be entertained." *Good*, 201 S.C. at 38, 21 S.E.2d at 211. *Good* applies the final judgment rule, but it does not apply here because this order is immediately appealable under a different provision of § 14-3-330.

Respondents contend Sections 14-3-330(1) and 2(c) speak to finality. (Memorandum, p. 9). This statement is, frankly, confusing. Section 14-3-330 permits appeals from final judgments under subsection (1) *or* certain judgments that are *not* final, *i.e.*, are intermediate or interlocutory. The appealability of non-final intermediate judgments, orders or decrees are appealable:

(1) if they involve the merits (§ 14-3-330(1));

(2) if they affect a substantial right when (a) effectively determines the action and prevents appeal or discontinues the action, or (b) grants or refuses a new trial, or (c) strikes out an answer or any part thereof or any pleading in any action (§ 14-3-

330(2));

(3) an interlocutory order or decree granting, continuing, modifying or refusing injunctive relief or the appointment of a receiver. (§ 14-3-330(4)).

Thus, while § 14-3-330(1) does indeed speak to finality, both § 14-3-330(1) and (2) also speak to appeals where the orders are *not* final. That is the entire point of those subparts.

Respondents then spend energy discussing the merits of the trial court's rulings as to each cause of action dismissed from the case. (Memorandum, pp. 9-12). Of course, whether the trial judge got it right as to any or all of her rulings is not the issue before the Court on this motion to dismiss. Rather, the issue is whether the order on appeal fits within one of the exceptions to the "final judgment rule" set forth in § 14-3-330.

At bottom, the order being appealed both "involves the merits" and "strikes out a pleading" while affecting a substantial right. The Supreme Court has repeatedly found the appeal of partial summary judgment to be immediately appealable, and this Court should follow those precedents and deny the Respondents' motion.

CONCLUSION

For the foregoing reasons the Court should deny the motion to dismiss and should permit this matter to proceed on appeal.

Respectfully submitted,

June 29, 2015

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Return to Motion to Dismiss* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Antonia T. Lucia, Esquire
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16 William Pope Dr., Ste 202
Bluffton, SC 29909

Erin Bridges

June 29, 2015
Columbia, South Carolina

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON
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BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

June 29, 2015

VIA HAND DELIVERY
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Kimberlee Tavino v. Christine Scheriff
Appellate Case: 2015-001179

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of the *Return to Motion to Dismiss Appeal* in this case. I have also enclosed a proof of service of this document on counsel for the Respondents. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: Robert M.P. Masella, Esquire
Antonia T. Lucia, Esquire