THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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SC Court of Appeals

Stephanie P. McDonald, Circuit Court Judge

Case No: 2015-001179

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.

RESPONDENTS' REPLY TO DEFENDANTS' RETURN RE: RESPONDENTS' MOTION TO DISMISS APPEAL

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The Respondents, Christine Scheriff and Frank Scheriff, pursuant to SCACR Rule 240(f), hereby submit this Reply to Appellants' Return to the Motion to Dismiss Appeal filed by Respondents.

The Appellants' appeal from the Orders of The Honorable Stephanie P. McDonald should be dismissed for the reasons set forth in the Respondents' supporting Memorandum of Law as further supported by the arguments herein.

I. Appellants misconstrued Respondents' argument with regard to SCRCP Rule 54(b) certification.

With regard to SCRCP Rule 54(b), Respondents argued on Page "7" of their supporting Memorandum of Law that:

> ...Absent certification, an order is not final, and therefore is subject to review at any time before final judgment on all claims.
>
> Accordingly, under SCRCP Rule 54(b), the uncertified orders at issue herein are not final, and are therefore not immediately appealable.
>
> Nevertheless, an uncertified interlocutory order may be immediately appealable if it fits into one of the categories listed in the Supreme Court's jurisdictional statute (South Carolina Code of Laws §14-3-330)...

Respondents were merely acknowledging that without certification, South Carolina Code of Laws §14-3-330 provides an alternative means to seek appellate review of an interlocutory order.

II. Considering the facts and circumstances of the case at bar, the Orders on appeal are not immediately appealable under §14-3-330.

Appellants would have this Court look no further than making a superficial and cursory determination that the Orders at issue granted Respondents' motion for partial summary judgment. While it is true that 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). *Link v. School District of Pickens County,* 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990), "the phrase 'involving the merits' is narrowly construed...An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights." *Ex Parte U-Drive-It, Inc.,* 369 S.C. 1, 7, 630 S.E.2d 464, 467-68 (2006). "The provisions of [s]ection 14-3-330, including subsection (2), have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by remedy of a new trial. *Hagood v. Sommerville,* 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005).

Similarly, "An order affects a substantial right and is immediately appealable when it '(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.'" *Hagood v. Sommerville,* 362 S.C. at 195, 607 S.E.2d at 709.

An order is not immediately appealable when appellants "have not 'arrived at the end of the road' and [would] be able to appeal the decision after the trial [wa]s finished." *Baldwin Constr. Co. v. Graham,* 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004). The supreme court has noted "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." *Good v. Hartford Accident & Indem., Co,,* 201 S.C. 32, 41, 21, S.E.2d 209, 212.

In keeping with these holdings, if the matters at issue in the appeal are intertwined with those to be determined at trial, the interlocutory order is not appealable until final judgment has been rendered. *Watson v. Underwood,* 407 S.C. 443, 756 S.E.2d 155, 164 (Ct.App. 2014).

A review of the findings of The Honorable Stephanie P. McDonald illustrate the inextricable connection between the causes of action which were dismissed by the grant of partial summary judgment and the surviving causes of action.

In the Ninth Cause of Action, the Court noted that this is the same tortious conduct which forms the basis of the causes of action for breach of fiduciary duty, conversion, setting aside the deed, equitable lien, resulting trust, and constructive trust, all of which are contained in the original Complaint and are not the subject of the Defendants' Motion for Partial Summary Judgment. . (See Page "4" of the Order of the Honorable Stephanie P. McDonald entered on October 21, 2014, a copy of which was attached as Exhibit "6" to the Respondents' supporting Memorandum of Law.)

As to the Tenth Cause of Acton for Civil Conspiracy, the Court noted that "Plaintiffs' allegations are tantamount to nothing more than the same tortious acts which are alleged in other causes of action and the same damages which are demanded in and recoverable again through other causes of action." (See Page "3" of the Order of the Honorable Stephanie P. McDonald dated April 30, 2015, ac copy of which was attached as Exhibit "7" to the Respondents' supporting Memorandum of Law.)

And finally, as to the Twelfth and Fourteenth Causes of Action for Breach of Contract and Breach of Contract Accompanied by a Fraudulent Act, the Court recognized that these causes of action are nothing more than an attempt to enforce the mediation

agreement which, despite the grant of partial summary judgment, the Appellants would have opportunity to do in Probate Court, assuming that they could come forward with admissible evidence. . (See Page "6" of the Order of the Honorable Stephanie P. McDonald entered on October 21, 2014, a copy of which was attached as Exhibit "6" to the Respondents' supporting Memorandum of Law.)

CONCLUSION

In *Thornton v. South Carolina Electric & Gas Corporation,* 391 S.C. 297, 304-305, 705 S.E.2d 475, 479-480 (Ct.App. 2011) this Court noted that "an appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c)", and that appealability "depends on the effect of the individual order under the facts and circumstances of the case". In considering both subsection 1 and subsection 2(c) of §14-3-330, this Court further noted that "[t]o decide whether a particular summary judgment order fits into either subsection, however, the court must examine the order to determine if it meets the subsection's criteria for appealability".

Certainly, the Appellants would have an opportunity to appeal the grant of partial summary judgment in an appeal from any final judgment. But more importantly, the Appellants will have the opportunity to present all relevant arguments and seek all alleged damages in the surviving causes of action. None of their rights or arguments will be precluded by dismissal of their appeal.

This would appear to be a proper case for a narrow construction of §14-3-330 which would in effect avoid piecemeal appeals without any detriment or prejudice to the Appellants.

WHEREFORE, Respondents request that this Court dismiss Appellants' Appeal, and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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Bluffton, SC
July 2, 2015

THE STATE OF SOUTH CAROLINA
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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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 2, 2015, I mailed a true and accurate copy of the *Respondents' Reply to Defendants' Return Re: Respondents' Motion to Dismiss Appeal* in the above-captioned matter to:

Robert M.P. Masella, Esquire
Masella Law Firm, P.A.
917 Calhoun Street
Columbia, SC 29201

John S. Nichols, Esquire
Bluestein, Nichols, Thompson & Delgado, LLC
1614 Taylor Street
Columbia, SC 29902

SAID DOCUMENTS were mailed via federal express, with postage prepaid to the above named parties.

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Debra A. Criddle
Legal Assistant to Antonia T. Lucia, Esquire
Attorney for the Respondents

SWORN TO BEFORE ME
this 2nd day of July, 2015

Notary Public for South Carolina
My Commission Expires: Nov. 22, 2015

VAUX MARSCHER BERGLIND

A SOUTH CAROLINA PROFESSIONAL ASSOCIATION

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July 2, 2015

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Via Federal Express

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumpter Street
Columbia, SC 29201

Re: Kimberlee Tavino, Individually and as Personal Representative of the Estate of Betty Jane Jackson, and Catherine Springfield v. Christine Scheriff and Frank Scheriff
Case No: 2015-001179

Dear Ms. Kitchings:

Enclosed for filing, please find an original and seven copies of the Respondents' Reply to Defendants' Return Re: Respondents' Motion to Dismiss Appeal

Also enclosed is a Certificate of Service.

Kindly file the originals and six copies and return a clocked-in copy in the enclosed self-addressed, stamped envelope.

Please advise if anything additional is required.

Very truly yours,

VAUX MARSCHER BERGLIND, P.A.

Antonia T. Lucia

ATL:dac

Enclosures

cc: Robert M.P. Masella, Esquire w/enclosure via Federal Express
John S. Nichols, Esquire w/enclosure via Federal Express

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