THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Roger M. Young, Jr., Circuit Court Judge

Case No. 2013-CP-10-5902
Appellate Case No. 2015-001853

Leanna Loud and William Loud, .....Respondents,

v.

Jeffrey Short, MD, individually, and
Charleston Radiologists, PA, .....Appellants.

**RESPONDENTS' MEMORANDUM REGARDING APPEALABILITY**

**To the Honorable Court of Appeals:**

Respondents Leanna Loud and William Loud (collectively referred to hereafter as "Loud") contend that the Notice of Appeal filed by Appellants, Jeffrey Short, MD, individually, and Charleston Radiologists, PA (collectively referred to hereafter as "Short"), is from an unappealable order and is being taken solely to delay the jury trial of this matter, which was set for a two-week term to commence on August 31, 2015.

## BACKGROUND AND PROCEDURAL POSTURE

This is a personal injury action involving the delayed diagnosis of breast cancer. The case was filed on October 7, 2013, after completion of the mandatory pre-suit

process. Affidavit of John Eric Fulda, Ex. A. Appellants answered on November 12, 2013. Affidavit of John Eric Fulda, Ex. B.

On May 1, 2015, the Honorable R. Markley Dennis set the case for a day certain trial to begin on August 31, 2015. Affidavit of John Eric Fulda, ¶ 8. A special two-week term was arranged because the Plaintiffs' counsel was concerned that the case could not be tried in a week. Affidavit of John Eric Fulda, Ex. C.

On August 17, 2015, two weeks before trial, Short filed a motion to amend the answer to add two new affirmative defenses: comparative negligence and statute of limitations. Affidavit of John Eric Fulda, Ex. D. Short had previously moved to amend on March 3, 2015, to add comparative negligence as an affirmative defense. Short withdrew the first motion to amend on May 4, 2015, the day before it was to be heard. Affidavit of John Eric Fulda, Ex. E, Ex. F.

The Trial Judge, the Honorable Roger M. Young, Jr., heard the motion to amend on August 27, 2015. Short's counsel acknowledged at the hearing that no new facts or information had come to light to trigger the eleventh-hour filing of the motion. Affidavit of John Eric Fulda, ¶ 9. Judge Young denied the Motion. Form 4 Order, attached to Notice of Appeal.

During a lunch break in the August 27, 2015 hearing, the undersigned emailed to Short's counsel a copy of *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 148 (2004), which held that an order denying a motion to amend was not appealable. Affidavit of John Eric Fulda, Ex. G. In spite of this authority, Short's counsel announced in open court their intent to appeal Judge Young's order denying their motion

to amend, solely as to the statute of limitations. Judge Young decided not to hear the remainder of the pre-trial motions and stayed the commencement of the jury trial. Form 4 Order, attached to Notice of Appeal.

## ARGUMENT

Short's appeal to this Court is improper. Judge Young's order denying the motion to amend is not appealable.

In *Baldwin Constr. Co. v. Graham*, *supra*, an appeal from an order denying a motion to amend was dismissed as not appealable. The *Baldwin* Court noted that under §14-3-330(2) *S.C. Code Ann.*, the appellate court may review an order affecting a substantial right "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. The only subsection that might conceivably be implicated by the order denying petitioners' request to be allowed to file an amended answer is subsection (c)." *Id.*, at 230.

The *Baldwin* Court went on to state that "the judge did not strike a pleading but refused to allow its filing." *Id.*, at 230. [Emphasis in original]. Accordingly, the Court in *Baldwin* concluded, "petitioners have not 'arrived at the end of the road' and will be able to appeal the decision after the trial is finished." *Id.* at 230. [Emphasis added].

As noted in *Baldwin*, the right to appeal in South Carolina is controlled by statutory law. The provisions of §14-3-330 *S.C. Code Ann.* are narrowly construed; the immediate appeal of orders issued before or during trial generally is not permitted. *State*

*v. Wilson*, 387 S.C. 597, 601, 693 S.E.2d 923, 925 (2010). "An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing *Mid-State Distribs., Inc. v. Century Imps.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993). "The final judgment rule serves the laudatory goal of preventing piecemeal review of matters that are merely steps toward a final judgment. In light of the policy underpinnings of the final judgment rule, exceptions should be recognized cautiously." *Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (S.C. Ct. App. 2004).

South Carolina Appellate Courts have stated in support of the final judgment rule that "most errors can be corrected by the remedy of a new trial." *Hagood,* 362 S.C. at 196, citing *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000) (holding an order denying motion for change of venue is not immediately appealable because any error in the order can be corrected by a new trial). In *Breland*, on Writ of Certiorari from the Court of Appeals, the Supreme Court stated the following concerning the denial of a motion to change venue:

> Requiring a defendant to wait until after trial to appeal the issue of proper venue is the most appropriate course to take where any error in that decision will not prejudice the defendant any more than other interlocutory orders which, if in error, would require a new trial.
>
> Since any trial error concerning venue will be correctable upon appeal, the only damage a losing party will sustain is the expense of litigating in an improper county. Even though proper venue is a substantial right, we have previously found the avoidance of a trial is not a sufficient reason to justify immediate appellate review. In this case, since any venue error will be correctable upon appeal after trial, we find the right of proper venue has not been affected such that the order would be immediately appealable.

*Id.*, at 94-95. [citations omitted, emphasis added].

Most interlocutory orders that are deemed appealable fall under §14-3-330(2) *S.C. Code Ann.* Under this subsection, an order must not only affect a substantial right, it must also prevent a judgment from which an appeal may later be taken. *Edwards v. SunCom*, 369 S.C. 91, 95, 631 S.E.2d 529, 531 (2006). Plainly, the denial of a motion to amend a pleading does not "prevent a judgment from which an appeal may later be taken." *See Baldwin Constr. Co. v. Graham, supra., Tatnall v. Gardner*, 350 S.C. 135, 138-139, 564 S.E.2d 377, 379 (S.C. Ct. App. 2002) (holding "[a]t conclusion of the present action, Logan may . . . appeal the trial court's order denying her motion to amend . . ."); *Wachovia Bank N.A. v. Beane*, 397 S.C. 612, 619, 725 S.E.2d 715, 719 (S.C. Ct. App. 2012) (reviewing after conclusion of trial the partial denial of motion to amend answer).

Short's counsel conceded that Judge Young's order denying the motion to amend to add the affirmative defense of comparative negligence was not appealable. In announcing their decision to appeal the order denying the motion with regard to the proposed statute of limitations defense, Short's counsel referenced Pennsylvania law.

Pennsylvania appeals courts, in some instances, allow the immediate appeal from a denial of a motion to amend because that jurisdiction gives consideration to "the possible expense and burden of two trials." *Marble v. Fred Hill & Son*, 425 Pa. Super 149, 152, 624 A.2d 190, 191 (1992) (quoting *Hull v. Tolentino*, 517 Pa., 328, 536 A.2d 787, 798-99). However, it is clear that South Carolina has rejected this consideration in determining the appealability of an interlocutory order. *See, Breland,* 339 S.C., at 94

(noting "we have previously found the avoidance of a trial is not sufficient to justify immediate appellate review.").

This Court should not recognize a new exception to the final judgment rule by allowing immediate appeal from the denial of a motion to amend, irrespective of the type of amendment sought. Allowing the appeal of such common interlocutory orders can be expected to open the floodgates of pre-trial appeals by parties who will view the exception as a convenient escape hatch to avoid and delay trial, to the great detriment of litigants and Court Administration.

Short scuttled this two-week trial which had been on the Trial Court's schedule for four months in order to delay the proceedings. Leanna Loud, whose testimony at trial is critical, is dying of breast cancer and may not survive any extended delay. Affidavit of John Eric Fulda, ¶ 7. This Court should not allow Short to benefit from this ill-considered attempt to use the State's appellate procedures for delay and to deprive the jury of the opportunity to judge the credibility and demeanor of Mrs. Loud through her in-court testimony.

## CONCLUSION

Respondents respectfully urge this Court to find that Short's Notice of Appeal is from an unappealable order. South Carolina law is settled on the point and further delay in briefing will serve no useful purpose. Respondents respectfully urge that the Court remand the matter expeditiously so that the trial can be re-set.

Respectfully submitted,

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September 4, 2015

Columbia, South Carolina

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## CERTIFICATE OF SERVICE

I certify that on this 4th day of September, 2015, I served the Respondents' Memorandum Regarding Appealability on Appellants Jeffrey Short, MD, individually and Charleston Radiologists, PA, by email as well as by depositing a true and correct copy of the same in the United States mail, postage prepaid, return address clearly printed on the envelope and addressed to:

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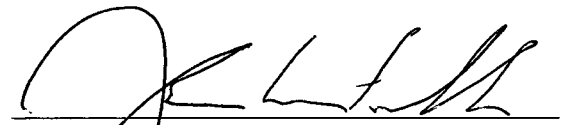

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September 4, 2015



The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29211

RE: Leanna Louse v. Jeffrey Short, M.D.
Appellate Case No.: 2015-001853

Dear Ms. Kitchings:

Enclosed for filing is the original and seven (7) copies of the Respondents' Memorandum Regarding Appealability in the above matter. Also, enclosed is the original and seven (7) copies of the Affidavit of John Eric Fulda to be filed in support of the Memorandum. We would greatly appreciate your filing the same and returning to us the file-stamped extra copy. As shown by the Certificate of Service, these documents are being served via email as well as by U.S. Mail on counsel for Appellants.

Also, please note for the docket that Appellants omitted from the Notice of Appeal counsel of record for Respondents, Cheryl F. Perkins whose email address is cperkins@attorneyssc.com.

We greatly appreciate your consideration in this matter.

With kindest regards, I am

Very truly yours,

John Eric Fulda

JEF:ssk
Enclosures
cc: Mary Agnes Hood Craig, Esquire
Deborah Harrison Sheffield, Esquire
Brian Edward Johnson, Esquire
Caroline Rinehart Niland, Esquire