STATE OF SOUTH CAROLINA
In the Court of Appeals

On Appeal from Charleston County
Court of Common Pleas

Honorable Roger M. Young, Sr., Circuit Judge
Civil Case No. 13-CP-10-5902

Appellate Case No.2015-001853

Leanna Loud and William Loud,

RESPONDENTS,

v.

Jeffrey Short M.D., individually
and Charleston Radiologists, P.A.,

APPELLANTS.

Appellants' Memorandum on Appealability

As directed by the Court, the Appellants submit this memorandum as to the Court's jurisdiction over the appeal from the Trial Court's order denying their motion to amend their answer to assert a statute of limitations defense. Appellants respectfully maintain that the Trial Court's ruling on the statute of limitations defense involves the merits, affects their substantial rights, and effectively strikes out an affirmative defense as contemplated in S.C Code Ann. §14-3-330.

Factual Background

The Plaintiff was diagnosed with Stage 4 breast cancer in 2010. She initiated the mandatory presuit process in 2013 and then filed this medical malpractice action in 2013,

alleging that the Defendant Radiologist was negligent in failing to discover that she had breast cancer when she had a mammogram in 2008 and that she would not be terminal if the cancer had been diagnosed at that time. The Defendant Radiologist (and his practice group) filed an answer denying that he was negligent in reading the mammogram in 2008; however, after conducting discovery of the Plaintiffs' experts, the Defendants moved to amend their answer to assert defenses of comparative negligence and the statute of limitations based on her own experts' opinions that Plaintiff's cancer could and would have been discovered in 2009 if she had returned for an annual follow-up mammogram as she had been advised to do rather than waiting until 2010.

Defendants assert that the Plaintiff's claim is barred by S.C. Code Ann. § 15-3-545 which provides for a statute of limitation of "three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it ***reasonably ought to have been discovered***, not to exceed six years from date of occurrence, or as tolled by this section." The Defendant maintains that the "reasonably ought to have been discovered" requirement is a reasonable diligence requirement, and that the Plaintiff reasonably ought to have discovered the alleged misreading in 2009 if she had used reasonable diligence in having an annual mammogram that year as instructed. *See* Strong v. Univ. of S. Carolina Sch. of Med., 316 S.C. 189, 191, 447 S.E.2d 850, 851-52 (1994).

The Plaintiff argues that the Defendants cannot prove comparative negligence or the statute of limitations bar unless there is some medical opinion evidence that it is more probably than not, to a reasonable degree of medical certainty, that her cancer would have been curable in 2009, and that there is no such evidence on that critical element. Plaintiff contends that the evidence shows, to the contrary, that it was stage one in 2008, and it was 95% survivable at that

stage, but a year later in 2009 survivability is speculative at best, or at worst, it was already terminal. [Tr. 10-12.]

The Trial Court denied the motion to amend on the ground that none of the experts could/would proffer an opinion that her cancer could have been cured if the cancer had been found in 2009.

> We've got to have somebody say if she had gone back in 2009, per the recommendations, it would have been caught, or probably would have been caught, more likely than not would have been caught, and
> it would have been treatable and it would have made a difference.
> That's what I need. [Tr. 24/14-19.]

In addition, on the statute of limitations defense, the Trial Court rejected the argument that the Plaintiff could have reasonably known in 2009 in she had been diligent about follow-up in 2009, ruling that: "it wasn't discovered until 2010, and that's when she was on notice, so that's when the statute of limitations began to run." [Tr. 31.] The Defendants filed a Notice of Appeal from the Trial Court's ruling on the statute of limitations defense.

Interlocutory Appeals under §14-3-330

> Appellate jurisdiction of pretrial orders is governed by S.C. Code Ann. § 14-3-330:
>
> 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.

The Plaintiff contends that the order is unappealable and is being taken solely to delay the trial citing to Baldwin Const. Co. v. Graham, 357 S.C. 227, 229, 593 S.E.2d 146, 147 (2004).

First, the possibility of an immediate appeal was initiated by the Trial Court. As shown by the transcript of the hearing attached hereto, after announcing that he was denying the motion to amend, it was the Trial Judge who raised the issue of whether the Defendants were going to appeal:

> THE COURT: Now, before we go through all of these other things that you have, that's a pretty important ruling. If you're going to appeal, let me know, and we can stop and you can go take it up on appeal. [Tr. 30-31.]
>
> ***
>
> THE COURT: Okay. I wasn't sure if you were going to -- I guess what I was asking you is some people would say, We think that's pretty important, and we think you're wrong, so they're going to appeal. It doesn't hurt my feelings. You're doing your job, so if you're going to do that, then I would just rather not deal with all these other motions because that means we're not going to have a trial on Monday. But if you're going to say, Well, I think you were wrong, respectfully, and all that other nice, flowery language and you we'll deal with that on appeal if we need to, then that's another thing. [Tr. 32.]
>
> ***
>
> There are some motions that -- some appeals that you can take and some you can't. I can never decide -- I can never keep it all straight which are interlocutory, and this seems to affect the mode of trial, so it seems to me that it's one of those that could be appealable, but that's not my deal, so I'll give you till -- how about we reconvene at 1:30, and if you guys say you want to appeal, you appeal, and, if not, we'll work our way through the rest of them. [Tr. 37.]

The Defendants were ready to proceed to trial, but the Trial Court' ruling on the statute of limitations defense is so pivotal that an immediate appeal best protects their rights as well as judicial economy.

As to the appealability, the Defendants submit that notwithstanding the ruling in Baldwin Construction, as cited by the Plaintiff, the Trial Court's ruling on the statute of limitations involves the merits, affects their substantial rights, and effectively strikes out an affirmative defense as contemplated in §14-3-330. In Baldwin Construction, the defendants, acting pro se, had filed a letter which was accepted as an answer, but when the defendants finally retained counsel, their attorney moved to permit filing of an amended answer, set-offs, and counterclaims. The trial court denied the motion based on discretionary grounds that did not involve the merits of the defenses, i.e. failure to cooperate in discovery, the interjection of the new matter that would require additional discovery, concluding that it would be unduly prejudicial to the plaintiff to enlarge the parameters of the litigation. 593 S.E.2d at 146-47. *See also* Jefferson v. Gene's Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988)(holding that an order denying a party's motion to file a late answer was a not directly appealable because the trial judge did not rule on the substantive contents of the answer).

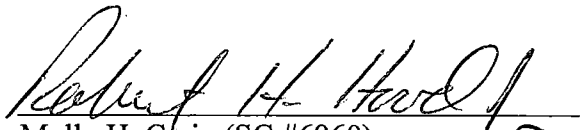
The Defendants respectfully submit that the ruling here involves the merits of the case and affects a substantial right because the Trial Court has ruled on the merits of the proffered defense which constituted a ruling on the substantive contents of the answer and acts as an order striking the statute of limitations defense on legal grounds. Also the ruling can be viewed as a ruling on sufficiency of the allegations which amounts to the granting of a Rule 12(b) motion to dismiss or a Rule 56 Motion for summary judgment. See Collins v. Sigmon, 299 S.C. 464, 466,

385 S.E.2d 835, 836 (1989) ("A motion to amend an Answer should be contested primarily by procedural arguments, not arguments concerning the substance and merits of the counterclaims and/or defenses proposed. .... Arguments going to the legal merits of a proposed defense or counterclaim are better taken up in the context of a Rule 12(b) motion to dismiss or a Rule 56 motion for summary judgment. It follows that the trial judge should generally not consider these substantive arguments at the mere amendment stage."); Pruitt v. Bowers, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct. App. 1998) (discussing nature and scope of ruling on Rule 15 motion to amend – "Arguments going to the legal merits of the proposed pleadings are better taken up in the context of a Rule 12(b) motion to dismiss or a Rule 56, SCRCP, motion for summary judgment.").

In the absence of any South Carolina appellate opinion specifically addressing the appealability of an order denying a motion to add a statute of limitations defense, the Defendants would proffer to the Court, for consideration, the judicious ruling of the Pennsylvania court in Horowitz v. Universal Underwriters Ins., 397 Pa. Super. 473, 477, 580 A.2d 395, 397 (1990), wherein the court held that an order denying a motion to amend a pleading to plead the statute of limitations as an affirmative defense was appealable because such a defense could control the outcome of the entire case. *See also* Grove v. Carle Foundation Hosp., 364 Ill.App.3d 412, 417, 846 N.E.2d 153, 157 (Ill.App. 4 Dist. 2006)(holding that order denying motion to amend was appealable because the trial court made a final disposition on the merit of the proposed claim); Mauney v. Morris, 73 N.C.App. 589, 591, 327 S.E.2d 248, 250 (N.C.App. 1985) (discussing appealability of order denying motion to amend that determines the entire controversy and/or involves a substantial right), rev'd, 316 N.C. 67, 340 S.E.2d 397 (1986) (reversing denial of motion to amend).

Respectfully submitted,

HOOD LAW FIRM, LLC



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September 14, 2015

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APPELLANTS.

Certificate of Service

I do certify that on this 14th day of September 2015, a copy of the Appellants' Memorandum on Appealability was served on Respondents by email as well as depositing a copy in U.S. Mail with sufficient first class postage to Counsel of Record:

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September 14, 2015

The Honorable Jenny Abbott Kitchings
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Re: Leanna Loud and William Loud v. Jeffrey Short, MD, individually and Charleston Radiologists, PA
C/A No. 2013-CP-10-05902, Charleston CP
Appellate Case No. 2015-001853
HLF File No. 25.064

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Appellants' Memorandum on Appealability with Certificate of Service in the above-referenced case. Please return a clocked-in copy in the enclosed stamped envelope.

By copy of this letter I am serving counsel for the Plaintiffs/Respondents.

Kind regards,

Yours truly,

Molly H. Craig

MHC/spc
Enclosure(s)
cc's [***Via E-Mail and U.S. Mail***]:
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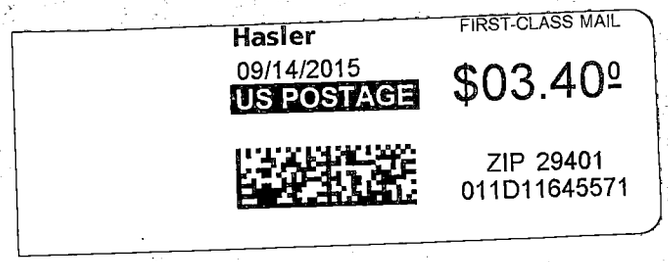

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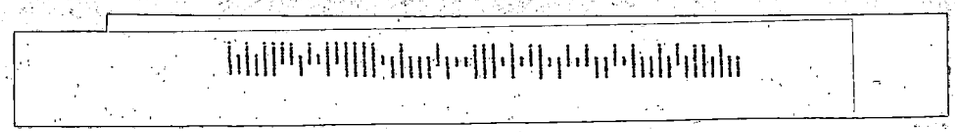

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