

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' MOTION FOR SANCTIONS AND COSTS

To the Honorable Court of Appeals:

This motion is made pursuant to Rules 222 and 269 of the South Carolina Appellate Court Rules, and Rule 240, which governs motions and petitions generally. Respondents, Leanna Loud and William Loud, move this Honorable Court for costs, attorney's fees and sanctions arising from Appellants' frivolous appeal from an unappealable order, which appeal was taken solely to delay the trial of this matter set for a two-week term which was to commence on August 31, 2015.

As a result of the stay of the trial, which had been set as a day certain trial since May 1, 2015, Respondents incurred significant costs and their attorneys expended significant time and effort. Fulda Aff. (9/4/15), ¶ 8. Fulda Aff. (10/9/15), ¶¶ 3-5. Respondents now must secure

another special term for setting a two-week trial, which delay creates immense prejudice to terminally ill Plaintiff, Leanna Loud.

On August 17, 2015, just two (2) weeks prior to the scheduled commencement of trial, Appellants filed a belated motion to amend their answer to add the affirmative defenses of comparative negligence and statute of limitations. Fulda Aff. (9/4/15), Ex. D. Appellants had already moved to amend to add comparative negligence more than six (6) months prior to the pre-trial motion. Fulda Aff. (9/4/15), Ex. E. They withdrew the motion on May 4, 2015, the day before it was to be heard. Fulda Aff. (9/4/15), Ex. F.

Appellants filed the eleventh-hour motion not because any new facts were developed and not because any new information had come to light. They filed the motion as a pre-trial strategy. Fulda Aff. (10/9/15), Ex. A, pp. 7-8.

When the trial judge denied the motion to amend during a pre-trial hearing on August 27, 2015, Appellants announced in open court their intent to file and serve an immediate appeal of the ruling. Fulda Aff. (10/9/15), Ex. A, pp. 37-38. Prior to Appellants' announcement, during a lunch break in the hearing, Respondents' counsel emailed to Appellants' counsel a copy of *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 148 (2004), which case makes it clear that an order denying a motion to amend is not immediately appealable under *S.C. Code Ann.* §14-3-330 (1976), which governs appeals in South Carolina. Fulda Aff. (9/4/15), Ex. G.

Following Appellants' announcement of their intent to file and serve an immediate appeal, Respondents' counsel warned of the dire consequences and argued that the appeal was frivolous, to no avail:

MS. PERKINS: . . . Our research indicates it's not appealable, and I think at this stage, a great deal of money has been spent.

Our client is dying. This may be her only opportunity to go to trial. There has been no hint of a statute of limitations defense until two weeks before trial when it was actually filed. It was – every single fact regarding this case that they’re claiming has been known since the case was filed. This is all based on medical records. The experts were deposed in 2014 and early 2015, and to stop trial now on this basis, I think is frivolous.

Fulda Aff. (10/9/15), Ex. A, p. 39-40.

Appellants ignored the holding in *Baldwin*, secured a stay of the day certain trial, and filed and serve the ill-advised appeal.

The Notice of Appeal, dated August 28, 2015, was received by this Court on September 2, 2015. The Clerk of Court immediately notified the parties that “a preliminary review of the order(s) challenged on appeal indicates it might not be appealable.”

On September 17, 2015, the Honorable John Cannon Few issued a Dispositive Order dismissing the appeal: “Because this is not an immediately appealable order, this appeal is dismissed. *See Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 148 (2004) (holding the denial of a motion to amend an answer is not immediately appealable).”

Appellants did not file a Petition for Rehearing and, therefore, the Remittitur was due to issue from this Court on October 2, 2015.

Appellants have defended their frivolous appeal, blaming the trial judge for raising the issue of appealing his ruling. Appellants’ Memorandum Regarding Appealability (App. Mem.), at 4. They also claim, erroneously, that they appealed because there was supposedly no authority governing appealability of the ruling. App. Mem., at 6.

Neither of Appellants’ purported justifications can explain or excuse stopping a two-week trial that parties, Court Administration, lay witnesses, and medical and other expert witnesses had blocked off for almost four (4) months. The ultimate costs to the Respondents as well as the justice system done by this tactic is immeasurable.

The trial judge questioned whether the Appellants would appeal, but also stated on the record regarding the appealability of his ruling: “There are some motions that – some appeals that you take and some you can’t. I can never decide – I can never keep it all straight which are interlocutory . . .” Fulda Aff. (10/9/15), Ex. A, p. 37.

Appellants’ counsel have the responsibility and ethical duty to research legal positions, particularly when the consequences are so devastating. The trial judge did not sign the Notice of Appeal, Appellants’ counsel did, under the mandates of Rule 11 SCRCR, and Rule 3.1, RPC, Rule 407, SCACR.

Appellants’ position that there was no authority on point regarding appealability of the order denying their motion to amend is likewise frivolous and, candidly, false. Respondents’ counsel had no trouble locating during a short lunch break on August 27, 2015, *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 148 (2004), the very case relied on by Judge Few to dismiss the appeal, a case which makes clear that an order denying a motion to amend is not immediately appealable no matter the issues raised in the motion.

Appellants even conceded in announcing their intent to appeal that “the denial of a motion to amend to add an affirmative defense, is not immediately appealable, so we’re not going to file a notice of appeal for the comparative claim.” Fulda Aff. (10/9/15), Ex. A, p. 38. Appellants inexplicably sought to distinguish their proposed statute of limitations defense as “outcome determinative.” Fulda Aff. (10/9/15), Ex. A, pp. 38-39. The same can be said, however, about *any* affirmative defense. Comparative negligence is certainly outcome determinative if the jury finds a sufficient percentage of plaintiff fault.

“Outcome determinative” is only a ground for immediate appellate review where the ruling “prevents a judgment from which an appeal might be taken.” *S.C. Code Ann.* §14-3-

330(2) (1976). This statute controls appeals in South Carolina, not a 1990 Pennsylvania case which Appellants quoted to the trial judge on August 27, 2015.

Most troubling is the fact that the 25-year old Pennsylvania case¹ Appellants cited as the sole case they could find to supposedly support an immediate appeal was, in fact, superseded in 1992 by a new Pennsylvania Rule of Appellate Procedure. Rule 341 PRAP rendered orders denying motions to amend to plead affirmative defenses no longer immediately appealable. *See Borough v. Heim*, 705 A.2d 456, 462 (Pa. 1997) citing to Comments to new Rule 341.

Despite the clear status of *Horowitz* as no longer stating valid appellate law in Pennsylvania, Appellants cited to the case again as “judicious” authority in its memorandum to this Court dated September 14, 2015, purportedly supporting the appealability of Judge Young’s ruling denying their pre-trial motion to amend. App. Mem, at 6.

Appellants, had they conducted even a modicum of research, would have concluded they had no ground for immediate appeal of any part of the ruling denying their motion to amend. But by simply filing and serving the frivolous appeal, they achieved the goal of scuttling a day certain trial.

A review of the calendar demonstrates Appellants’ bad faith. Fourteen (14) days from August 28, 2015, the date Judge Young’s order was entered, marked the latest date the trial would have ended had Appellants not circumvented the process. Even at that point, Appellant would have had sixteen (16) more days to file a protective appeal based on any supposed uncertainty regarding appealability of Judge Young’s pre-trial ruling. They did not have to stop the trial to protect their right to appeal. They stopped the trial in the face of settled precedent

¹ *Horowitz v. Universal Underwriters Ins.*, 397 Pa. Super. 473, 580 A.2d 395 (1990).

against their claim that the order was appealable because they did not want the trial to go forward.

This Court should not tolerate a practice of trial counsel abusing the rules of appellate procedure by filing eleventh-hour appeals to rulings on pre-trial motions, a practice that renders even the most cast in stone day certain trials uncertain. The immense amount of time, effort, and expense which goes into scheduling and preparation for a complex multi-week medical malpractice trial should not be subject to the whim of attorneys who use an ill-conceived, last minute, frivolous appeal as an escape valve for a trial that a party has decided should not go forward. It is abusive and should not be tolerated.

As an astute justice of the California Court of Appeals noted regarding appeals taken as a “free time-out:”

Top-drawer legal representation, such as both parties have engaged here, can obscure the core frivolousness of an appeal beneath layers of artful obfuscation which only the most painstaking examination can peel away.


Hewlett-Packard Co. v. Oracle Corp., 239 Cal. App. 4th 1174, 1185, 2015 Cal. App. LEXIS 754, *16 (Cal. App. 6th Dist. 2015).

Respondents respectfully urge this Court to award costs and fees as documented in the affidavit of John Eric Fulda filed herewith, to find that the appeal taken was frivolous as contemplated by Rule 269 and to impose severe sanctions sufficient to penalize the Appellants in this case for their frivolous appeal. The Court should also send a message that will discourage attorneys in this state from viewing the filing of a frivolous pre-trial appeal as a “free time-out” to create delay in the administration of justice.

[signature on following page]

Respectfully submitted,

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October 12, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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Appellate Case No. 2015-001853

Leanna Loud and William Loud,Respondents,

v.

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

CERTIFICATE OF SERVICE

I certify that on this 12th day of October, 2015, I served the Respondents' Motion for Sanctions and Costs on Appellants, Jeffrey Short, MD, individually and Charleston Radiologists, PA, by email as well as by email and 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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October 12, 2015

Columbia, South Carolina

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October 12, 2015
Reply to Columbia

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
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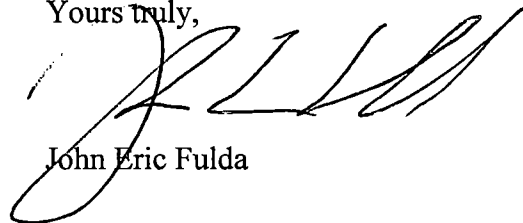
RE: Leanna Loud v. Jeffrey Short, M.D.
Appellate Case No.: 2015-001853

Dear Ms. Kitchings:

Enclosed for filing is the original and seven (7) copies of the Respondents' Motion for Sanctions and Costs 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 Motion. We would greatly appreciate your filing the same and returning to us the file-stamped extra copies. As shown by the Certificate of Service, these documents are being served on counsel for the Appellants via email as well as by U.S. Mail.

We appreciate your consideration in this matter. With kind regards, I am

Yours truly,



John Eric Fulda

JEF:lrc
Enclosures

cc: Mary Agnes Craig, Esquire
Deborah Harrison Sheffield, Esquire
Brian Edward Johnson, Esquire
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