THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED
OCT 26 2015
SC Court of Appeals

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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS AND COSTS

Respondents submit this Reply Memorandum in support of their Motion for Sanctions and Costs pursuant to Rules 222 and 269, SCACR.

Appellants claim a "good faith" belief in the appealability of the subject ruling under *S.C. Code Ann.* §14-3-330. They argue that a statute of limitations defense can be "outcome determinative" and that the Trial Court's ruling affected their substantial rights. They do not explain how a statute of limitations defense is potentially more outcome determinative than other affirmative defenses including, potentially, comparative negligence.

Appellants have all along agreed that the denial of their motion to amend to add comparative negligence as a defense was not immediately appealable. Tr. 38:20-25 – Ex. A to Aff. of John Eric Fulda (10/12/15); Memorandum in Opposition to Motion for Sanctions and

Costs ("Opp. Mem.") at 5.

Appellants also state that the ruling appealed from was immediately appealable because "the Trial Judge ruled on the merits of the statute of limitations defense based on the absence of an opinion from any of the experts that her cancer could have been cured if the cancer had been found in 2009." Opp. Mem. at 2. This was not the Trial Court's ruling.

What Appellants paraphrase as the Trial Court's ruling was actually his ruling denying their motion to amend to add comparative negligence as a defense, a ruling they did not appeal. The full excerpt is:

> THE COURT: . . . **you don't have any medical professional willing to say, to a reasonable degree of medical certainty, it would have made a difference because you have the burden of proof on the counterclaim, or the affirmative defense of comparative negligence,** then you don't have causation if you don't have somebody who is willing to stand up and say, to a reasonable degree of medical certainty, if she had gone back, we would have found it, or somebody would have found it, and it would have been curable,
>
> * * *
>
> I'm wearing my blue socks, but I don't think you got it, so **I'm going to have to deny your motion to amend.** Okay?

Tr. 29:21-30:21 – Ex. A to Aff. of John Eric Fulda (10/12/15) [emphasis added].

Appellants' mistaken reliance on the substance of the Trial Court's ruling on comparative negligence is perplexing since this is the ruling they agree is not appealable.

It was also at the above point in the proceedings, directly following the ruling denying the motion to amend to add comparative negligence, that the Trial Judge first questioned whether Defendants would 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. 30:23-31:2. – Ex. A to Aff. of John Eric Fulda (10/12/15).

Appellants, however, wrongly imply that the above quote from the Trial Judge was a comment on the statute of limitations ruling. Opp. Mem., at 5. It is difficult to conceive that Appellants could have so mistaken the context of the Trial Judge's comment in light of the very next lines of transcript:

> MS. CRAIG: Before I make that decision, could we get a ruling on the statute of limitations?

Tr. 31:3-4 – Ex. A to Aff. of John Eric Fulda (10/12/15).

Appellants also do not answer Respondents' observation that under *S.C. Code. Ann.* §14-3-330 (emphasis added), orders are appealable as outcome determinative when the order:

> (2)(a) in effect determines the action **and prevents a judgment from which an appeal might be taken or discontinues the action**.

Appellants do not contend that disallowing their request to add the affirmative defense of statute of limitations, "prevents a judgment from which an appeal might be taken or discontinues the action." Instead, Appellants state they "**thoughtfully contemplated** that an immediate appeal would best protect their rights as well as serve judicial economy in possibly preventing the need for two lengthy trials." Opp. Mem. at 4.

Appellants' actions were not thoughtful, but willfully indifferent to binding South Carolina authority. In *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000), the South Carolina Supreme Court, on Writ of Certiorari from the Court of Appeals, stated the following concerning the denial of a motion to change venue:

> Requiring the 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 other 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 sufficient to justify immediate appellate review**.

Breland, 339 S.C. at 94, 529 S.E.2d at 14 [citations omitted; emphasis added].

Also, while no written order was issued, the record reflects that numerous issues concerning Appellants' motion to amend as a whole were addressed during the hearing, including timeliness and whether new information had been discovered;[1] potential prejudice to Respondents (Tr. 9:21-25; 12:21-14:2); and the impact of Appellants' earlier motion to amend to add comparative negligence, filed and then withdrawn when it was scheduled to be heard months before the trial date (Tr. 2:9 -14). Ex. A to Aff. of John Eric Fulda (10/12/15); Ex. E and Ex. F to Aff. of John Eric Fulda (10/12/15). These issues were argued in addition to the obvious lack of substance of Appellants' new proposed defenses that their own experts could not support. Tr. 9:22-10:1; 21:2-12; 23:1-2 – Ex A to Aff. of John Eric Fulda (10/12/15).

Appellants attribute the conception of a statute of limitations defense to deposition testimony by Plaintiffs' experts. Opp. Mem. at 2, 4. But Respondents' liability experts'

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[1] THE COURT: . . but it's not information you didn't have back in May or whenever when you were talking to Judge Dennis about a trial date?

Tr. 7:22-24 – Ex. A to Aff. of John Eric Fulda (10/12/15).

> THE COURT: When did you come up with this?
> . . .
> THE COURT: The new information from the experts.
> MS. CRAIG: It's not new information, Your Honor.

Tr. 7:13-18 – Ex. A to Aff. of John Eric Fulda (10/12/15) ; see, also, Tr. 34:18-24; 39:21-40:4.

depositions were taken on November 25, 2014, December 8, 2014 and February 20, 2015. ¶¶ 3-5, Supp. Aff. of John Eric Fulda (10/26/15); Tr. 39:22-40:4 – Ex. A to Aff. of John Eric Fulda (10/12/15). Appellants moved to amend **six (6) months later**, on August 17, 2015, virtually on the eve of the August 31, 2015 day certain trial.

Appellants focus on the supposed "pivotal" nature of their newly minted statute of limitations defense as driving their decision to take an immediate appeal and stop a trial that had been scheduled for months. Appellants do not explain how a defense that is now touted as "pivotal" did not occur to these highly experienced medical malpractice defense attorneys until two (2) weeks prior to trial.

Appellants contend that their motion to amend was a "strategic decision" in the pre-trial period, which they claim was "aimed at preserving all potential defenses." Opp. Mem. at 4. Yet once the Motion was made, these potential defenses were preserved for an appeal from final judgment when the trial concluded, which would have been, at most, just two weeks later. It is not a "bald assertion" that Appellants stopped the trial in hopes that this dying plaintiff would not survive to testify. Opp. Mem. at 4. It is the only conclusion given Appellants' failure to tender any other explanation.

In their opposition memorandum, Appellants distort the substance of their last-minute statute of limitations claim, without supporting this supposed "factual background" with record citations or supporting affidavits as required by Rule 240(c)(3), SCACR. Opp. Mem. at 2.

What Appellants actually sought in the Court below was to conflate the reasonable diligence standard of the statute of limitations discovery rule, with the American Cancer Society's mammogram screening guidelines – guidelines that were questioned during the

relevant time in 2009 by the U. S. Preventive Care Task Force and substantially revised just last week.[2] Tr. 8:16-9:20 – Ex. A to Aff. of John Eric Fulda (10/12/15).

Mrs. Loud's 2008 letter advising her of a **normal** mammogram result stated: "Current American Cancer Society guidelines recommend screening mammograms and physical breast exam every year beginning at age 40." Tr. 8:20-9:3 – Ex. A to Aff. of John Eric Fulda (10/12/15). She chose to heed the U.S. Preventive Care Task Force Report published in 2009 and planned her next screening for 2010. Tr. 9:6-20 – Ex. A to Aff. of John Eric Fulda (10/12/15). Appellants urged in their motion to amend that this choice equates to a lack of reasonable diligence and comparative negligence, even though their own experts were already on record against their premise. Tr. 9:22-25; 21:2-12; 23:1-2 – Ex. A to Aff. of John Eric Fulda (10/12/15). [3]

Finally, Appellants again seek to bootstrap their "good faith" argument onto the Trial Judge's comments, all made within the context of his frank statement on appealability that "I don't know whether it is or it isn't." Tr. 40:5-6 – Ex. A to Aff. of John Eric Fulda (10/12/15).

It was Appellants' decision to appeal. It took Respondents' counsel minutes to locate and

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[2] Headlines from October 20-21, 2015 document that the American Cancer Society, in a dramatic about-face, revised its mammogram screening guidelines, bringing them more in line with 2009 U.S. Preventive Care Task Force recommendations. *See, e.g., New Breast Cancer Guidelines: Screen Later, Less Often:* http://www.cnn.com/2015/10/20/health/new-acs-breast-cancer-screening-guidelines/index.html; *New Mammogram guidelines Already Creating Controversy:* http://news.health.com/2015/10/21/new-mammogram-guidelines-already-creating-controversy/.

[3] A proposed amendment that "is completely and obviously frivolous substantively, [] may be denied in the discretion of the trial judge." *Collins v. Sigmon*, 299 S/C/ 464, 385 S.E.2d 835 (1989).

transmit to Appellants' counsel a copy of the *Baldwin* case, relied on by this Court to dismiss the appeal. Ex. G to Aff. of John Eric Fulda (9/4/15). This "research" was for the purpose of putting Appellants' counsel on unequivocal notice of Respondents' position, also stated on the record at the hearing, that "to stop the trial now on this basis, I think, is frivolous."

Tr. 40:2-4 – Ex. A to Aff. of John Eric Fulda (10/12/15).

In conclusion, Respondents respectfully request that this Honorable Court award costs and fees, and enter such sanctions as it deems appropriate.

Respectfully submitted,

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October 26, 2015
Columbia, South Carolina

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v.

Jeffrey Short, MD individually and
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CERTIFICATE OF SERVICE

I certify that on this 26th day of October, 2015, I served the Respondents' Reply Memroandum in Support of Motion for Sanctions and Costs on Appellants Jeffrey Short, MD, individually and Charleston Radiologists, PA, by email as well 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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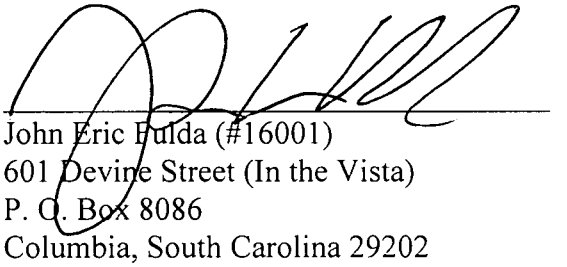

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SUPPLEMENTAL AFFIDAVIT OF JOHN ERIC FULDA

PERSONALLY appeared before me John Eric Fulda who being duly sworn, deposes and says:

1. I am one of the attorneys for Respondents Leanna Loud and William Loud.

2. On March 2, 2014, Appellants completed the depositions of both Leanna Loud and William Loud.

3. On November 25, 2014, Appellants took the deposition of William W. Woodruff, III, M.D., Respondents' expert in the field of radiology.

4. On December 8, 2014, Appellants took the deposition of Luis Villa, M.D., Respondents' expert in the fields of oncology and pathology.

5. On February 20, 2015, Appellants took the deposition of Lynn R. Chinitz, M.D.,

Respondents' second expert in the field of radiology.

FURTHER DEPONENT SAYETH NOT.

John Eric Fulda

SWORN to before me this
26 day of October, 2015

Louise L. Christian (L.S.)
My Commission Expires: 2/29/16

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v.

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CERTIFICATE OF SERVICE

I certify that on this 26th day of October, 2015, I served the Supplemental Affidavit of John Eric Fulda on Appellants Jeffrey Short, MD, individually and Charleston Radiologists, PA, by email as well 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 26, 2015
Reply to Columbia

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

RE: Leanna Loud v. Jeffrey Short, M.D.
Case No.: 2013-CP-10-5902
Appellate Case No.: 2015-001853

Dear Ms. Kitchings:

Enclosed for filing is the original and seven (7) copies of the Reply Memorandum in Support of Motion for Sanctions and Costs in the above matter. Also, enclosed is the original and seven (7) copies of the Supplemental 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 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 (as noted)

cc: Mary Agnes Craig, Esquire
Deborah Harrison Sheffield, Esquire
Brian Edward Johnson, Esquire
Caroline Rinehart Niland, Esquire
David L. Savage, Esquire
J. Rutledge Young, III Esquire