**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 in Opposition to Respondents' Motion for Sanctions and Costs

The Appellants submit this memorandum in opposition to the Respondents' motion for costs, attorney's fees and sanctions pursuant to Rule 222 and 269, SCACR, following this Court's dismissal of their appeal on the ground that the order was not immediately appealable. Appellants respectfully submit that the appeal was not frivolous nor taken solely for the purpose of delay, but rather, there was a good faith and reasonable argument that the Trial Court's denial of their motion to amend the answer to assert a statute of limitations defense was immediately appealable under S.C Code Ann. §14-3-330 because it amounts to a ruling on the merits that

affects their substantial rights, and effectively strikes out an affirmative defense as contemplated in S.C Code Ann. §14-3-330.

While the pertinent factual background was set forth in the memorandum previously submitted to the Court, it perhaps bears repeating some of the details in this response to the Plaintiff/Respondent's pending motion for sanctions. Briefly, the Plaintiff, who was diagnosed with Stage 4 breast cancer in 2010, 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. While the Defendant Radiologist (and his practice group) filed an answer denying that he was negligent in reading the mammogram in 2008, the Defendants later moved to amend their answer to add a statute of limitations defense under S.C. Code Ann. § 15-3-545. The motion to amend was made after the Plaintiffs' experts testified in their depositions 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.

The Defendants assert the statute of limitations defense based on the reasoning that the "reasonably ought to have been discovered" requirement of §15-3-545 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). In denying the motion to amend, the Trial Court 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.

The Defendants immediately filed a Notice of Appeal from the Trial Court's ruling on the statute of limitations defense, dated August 27, 2015. After submission of memoranda from the

parties, the Court issued its order dismissing the appeal as interlocutory, relying upon Baldwin Const. Co. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004), an appeal from an order denying a motion to amend an answer that was dismissed as interlocutory. The Defendants respectfully maintain that the dismissal of that appeal is distinguishable because there the trial court denied the motion to amend based on discretionary grounds that did not involve the merits of the defenses, while in contrast, the Trial Court's ruling in this case constitutes a ruling on the merits of the defense and affects their substantial rights. The Defendants position rests on the rulings and reasoning in Collins v. Sigmon, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989), Pruitt v. Bowers, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct. App. 1998), and Jefferson v. Gene's Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988),[1] as support for their position that the Trial Court's ruling on the merits of the statute of limitations defense amounts to a grant of summary judgment, rather than a denial of a Rule 15 motion.

While the Defendants still maintain that the Trial Court's ruling is appealable under §§14-3-330, they elected not to petition for a rehearing, and the Remittitur was issued on October 8, 2015. The Plaintiff now seeks to have this Court impose sanctions with contentions that the Defendants knew the appeal was interlocutory and only filed the notice of appeal to delay the trial and deprive the Plaintiff of her day in court. The Defendants, while respecting the Court's dismissal of the appeal, maintain that the motion for sanctions should be denied because

[1] The Defendants also relied upon authorities in other jurisdictions, namely: Horowitz v. Universal Underwriters Ins., 397 Pa. Super. 473, 477, 580 A.2d 395, 397 (1990)(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); 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).

they had a good faith and reasonable argument that the Trial Court's denial of their motion to amend the answer to assert a statute of limitations defense amounts to a ruling on merits that affects their substantial rights, and effectively strikes out an affirmative defense as contemplated in S.C Code Ann. §14-3-330.

The Plaintiff's Counsel makes bald, accusations that the Plaintiff is dying and the Defendants are trying to deprive her of her only opportunity to appear in court and the notice of appeal was filed to get a "free timeout." The Defendants maintain that they did not file the notice of appeal for the purpose of delaying the trial or to deprive the Plaintiff of her day in court. The Defendants filed the motion to amend after discovery depositions were taken and during the process of making the usual trial preparation and plans as the trial date approached. To the extent that the motion to amend was a strategic decision, it was aimed at preserving all potential defenses, not at derailing the trial set for a day certain. As of the hearing date, the Defendants were fully prepared and ready for trial. There absolutely was no need to obtain a "free timeout" as the Plaintiff accuses. Rather, given that the Trial Court' ruling on the statute of limitations defense is so pivotal -- literally outcome determinative -- Defendants 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.[2]

The Defendants had not even contemplated taking an immediate appeal from the Trial Court's denial of their motion until the Trial Court raised the question of an immediate appeal. The Defendants have not, as the Plaintiff accuses, attempted to blame the Trial Judge for raising the issue of appealing his ruling; rather, Defendants have cited to and relied upon the Trial

[2] It is the Plaintiff's Counsel who insists that the trial will take two weeks.

Court's commentary on the issue in rebuttal to the contention that the decision to take an immediate appeal was frivolous and improperly motivated.

As shown by the hearing transcript, it was the Trial Judge who acknowledged the importance of the issue and 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.]
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> ***
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> 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.]
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> ***
>
> 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.]

As further shown in the transcript, during a break, both parties and the Trial Judge researched the appealability question. Plaintiff's Counsel took the position that it was not appealable: "Our research indicates it's not appealable." [Tr. 39.] Quick research by the Defendants' Counsel during the break indicated that the denial of their motion to amend to add a comparative negligence defense might not be immediately appealable, but they did not find any South Carolina appellate authority that specifically addressed the appealability of a denial of a motion to amend to assert a statute of limitations defense. However, they did find the Pennsylvania

decision 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. [Tr. 38-39.]

On this point of whether sanctions are warranted, it is most worthy of note that even though the Trial Court was unclear as to whether the order was immediately appealable, he did view the appealability issue as a novel one:

> THE COURT: Well, you know, I don't know whether it is or it isn't. I know my law clerk did some research and came up with the same law that Ms. Craig did about motion to amend on the comparative negligence, but
> I think it's perhaps a novel issue on the statute of limitations. It certainly seems to be one of those things that is outcome determinative, but I imagine they're going to file an appeal either this afternoon or tomorrow, and then y'all can argue to Court of Appeals that this needs to be dismissed and dismissed right away because it's interlocutory, and, if they agree with you, come back, and we'll get you another trial date as soon as we can. [Tr. 40.]

Based on that information in that limited time frame, Defendants' Counsel deemed it in the clients' best interest to file a notice of appeal with regard to the statute of limitations defense because it is outcome determinative. [Tr. 40.] While this Court has rejected the Defendants' arguments and dismissed the appeal as interlocutory, Defendants maintain that all these circumstances evidence that the appeal was not frivolous and respectfully submits that an award of sanctions is not warranted.

Respectfully submitted,

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October 21, 2015

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Certificate of Service

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I do certify that on this 21st day of October 2015, a copy of the Appellants' Memorandum in Opposition to Respondents' Motion for Sanctions and Costs 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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