RECEIVED
JAN 11 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE RICHLAND COUNTY
COURT OF COMMON PLEAS

Doyet A. Early, Circuit Court Judge
Case No. 2008CP4006656

JOHN R RAKOWSKY,

Respondent,

v.

Adrian L. Falgione, James Spencer, Estate of Doris Holt, Rodney Lail, Irene Santacroce, Marguerite Stephens, Ricky Stephens, Horry County, South Carolina,

Appellants.

JOINT REPLY BRIEF OF APPELLANTS

Michael G Sribnick, MD, JD
3 Kenilworth Avenue
Charleston, SC 29403
(843)789-3504
Email: michael.g.sribnickmdjdllc@gmail.com
Attorney for Plaintiffs-Appellants, Irene Santacroce, Rodney Lail, Estate of Doris Holt

James B. Spencer, *Pro Se*
Box 183
7001 Saint Andrews Rd.
Columbia, SC 29212
(803) 414-0889

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

REPLY 1
A. This Appeal Brings Up All Intermediate Orders for Review 1
B. The Affidavit Does Not Constitute an Accounting 4
C. Rule 22(b) Required Payment Into Court 5
D. No Basis for Legal Fees 5
E, Appellants are Entitled to Compensation for the Loss of their Funds 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Adickes v. Allison & Bratton, 21 S.C. 245 (1884) 2, 3

Appeal–Dismissal–Bar to Later Appeal, Ann., 96 A.L.R.2d 312 3

Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (S.C. App. 2001), cert. dismissed 354 S.C. 57, 579 S.E.2d 605 (S.C. 2003) 6

Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006) 3

Charleston Cnty. Assessor v. LMP Props., Inc., 403 S.C. 194, 743 S.E.2d 88 (S.C. App. 2013) 4

Dreher v. S.C. Dep't of Health & Envtl. Control, Appellate Case No. 2013-000364 (S.C. 2015) 3

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) 1

First Union Nat. Bank of South Carolina v. FCVS Communications, 328 S.C. 290, 494 S.E.2d 429 (1997) 5, 7

United States v. Fremont, 18 How. (59 U.S.) 30, 15 L.Ed. 241 (Catron, J., concurring in part and dissenting in part) 3

Griffin Plumbing & Heating v. JJ & G, 351 S.C. 459, 570 S.E.2d 197 (S.C. App. 2002) 3

Henderson v. Wyatt, 8 S.C. 112 (1877) 2

Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939) 6

Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988) 2

Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (2009) 3

Lewis v. State, 368 S.C. 630, 630 S.E.2d 464 (2006) 2

Link v. School District of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990) .. 2, 4

Buerhaus v. De Sausstjre, 41 S.C. 457, 19 S.E. 926 (1894) 4

Padgett v. Colleton County, 383 S.C. 431, 679 S.E.2d 533 (S.C. App. 2009) 6

Runyon v. Wright, 322 S.C. 15, 471 S.E.2d 160 (1996) 7

U.S. Fire Ins. Co. v. Asbestospray Inc., 182 F.3d 201 (3d Cir. 1999) 5

STATUTES

S.C.Code Ann. § 14-3-330(1) 2, 3

PRELIMINARY STATEMENT

Respondent's arguments seem to be based on purported procedural barriers. More specifically, they contend that the dismissal of an appeal from a prior non-final order precludes appellate review of the final order. They are wrong.

However, it is the actions of the judge in conducting this litigation that cannot be ignored by this court. This included the fact this litigation was conducted by the judge without following the proper procedure and court rules that included the use of email to take away rights of procedural due process and a pattern of *ex-parte* communications. Furthermore, the judge ignored the rules requiring the Respondent to keep proper records of litigation funds provided to Respondent by his seven independent clients in accordance with Rule 417 SCACR in accordance with Rule 1.15. The Respondent also failed to complete the requirement of an executed letter of informed consent from each of the plaintiffs required under South Carolina Court Rule 407 1.8(g) which is consistent with Federal Local Rule 83.1.08. The required letter of informed consent would have detailed the distribution of settlement proceeds to the Appellants. In that regard, allowing this litigation to proceed that was filed in *"bad faith"* by the Respondent needs to be addressed. Respondent should have been and now should be sanctioned for making the interpleader filing in *"bad faith."* Nowhere in

Respondent's reply did he address these highly pertinent issues addressed above continually raised by the Appellants. Significantly, the issues Respondent has not replied to are deemed admitted.

REPLY

A. This Appeal Brings Up All Intermediate Orders for Review

Respondent attempts to circumvent what he identifies as "Issues A, B, and C" by claiming, without basis, that they have already been adjudicated. Although it is true that this Court dismissed an appeal from an intermediate order as untimely, this did not amount to an affirmance or render the intermediate order as the law of the case. The Respondent cited Judge Seals' order dated July 25, 2011, which was appealed to the South Carolina Appellate Court of Appeals. This became Appellate Case No: 2011-204306. The Appellate Court ruled on February 24, 2012, that this appeal was interlocutory and could not be heard until the final order was issued in this interpleader case. The Final Order was issued by the Richland County Clerk of Court on December 29, 2014 in this interpleader action.

First, it is not at all clear that the intermediate order was appealable, a question that this Court did not reach because if the notice of appeal was not timely filed, that would be a jurisdictional defect. Timeliness of an appeal is a threshold

jurisdictional matter. See *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 17, 602 S.E.2d 772, 776 (2004).

As a general rule, only final orders are appealable. See, e.g., *Lewis v. State*, 368 S.C. 630, 631, 630 S.E.2d 464, 464 (2006) ("Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final.") (quoting *Adickes v. Allison & Bratton*, 21 S.C. 245, 259 (1884)); *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988) (finding an interlocutory order is appealable under S.C. Code Ann. § 14-3-330(1) only if it involves the merits, i.e. it "finally determines some substantial matter forming the whole or a part of some cause of action or defense ....") (quoting *Henderson v. Wyatt*, 8 S.C. 112, 112 (1877)).

Interlocutory orders "involving the merits" are appealable, but the phrase "is narrowly construed in modern precedent. An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties rights'." *Ex parte Capital U–Drive–It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006).

Be that as it may, in *Link v. School District of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990) (finding the failure to immediately appeal the grant of partial summary judgment was not fatal as a party was entitled under § 14-3-330(1) to wait until final judgment to appeal an intermediate order) the supreme court held that under S.C. Code Ann. § 14-3-330(1), when a party timely files a notice of intent to appeal from a judgment, the appellate court may review any intermediate order necessarily affecting the judgment not earlier appealed. See also *Griffin Plumbing & Heating v. JJ & G*, 351 S.C. 459, 468, 570 S.E.2d 197 (S.C. App. 2002).

It is, of course, black letter law that a dismissal of an appeal does not operate as an adjudication on the merits. See Appeal--Dismissal--Bar to Later Appeal, Ann., 96 A.L.R.2d 312, § 2, p. 314, and cases collected; *United States v. Fremont*, 18 How. (59 U.S.) 30, 37, 15 L. Ed. 241 (Catron, J., concurring in part and dissenting in part); 4 C.J.S. Appeal and Error § 34, p. 137. All the more should this be so when, as here, the notice of appeal was not timely filed, so there literally was no appeal before this Court at all, or, as Respondent puts it, "this Court never gained jurisdiction over the appeal." Br., p. 6.

None of the cases cited by Respondent are remotely on point. In *Dreher v. S.C. Dep't of Health & Envtl. Control,* Appellate Case No. 2013-000364 (S.C.

2015), the Supreme Court held that this Court erroneously applied law of the case; Respondent takes the dicta out of context. Rather, as is made clear by the cases cited, such as *Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 151, 153 (2009), where the Court said "Under the law-of-the-case doctrine, a party is precluded from *relitigating, after an appeal*, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."

Charleston Cnty. Assessor v. LMP Props., Inc., 403 S.C. 194, 201, 743 S.E.2d 88 (S.C. App. 2013) is similarly off-point. Law of the case was rejected because there was no appeal taken from the challenged determination.

Accordingly, pursuant to *Link* this appeal is properly before this Court.

B. The Affidavit Does Not Constitute an Accounting

In what Respondent identified as "Issue A," as we anticipated, Rakowsky continues to rely upon the Mara T. Ballard affidavit as a full accounting in the matter. It is not. Rakowsky also continues to ignore Mara T. Ballard's concession that her "review" was conducted on incomplete records selected and supplied by Mr. Rakowsky.

The simple answer, which remains unrefuted, is that if the affidavit constituted an "accounting," then Appellants had the right to object to it. A formal

hearing was required following discovery and since it is purported to be an "expert" report by Mara Ballard, then Appellants were entitled to challenge it through live cross-examination with the records of the basis of her report in hand. On this score, Rakowsky continues to ignore the proper procedures set forth in Buerhaus v. *De Saussjire*, 41 S.C. 457, 19 S.E. 926, 929, 944 (1894).

> "When the amount with which the accounting party should be charged is ascertained in the mode prescribed, either by admission or proof, the accounting party must discharge himself by the production of receipts or other competent evidence."
>
> BUERHAUS v. DESAUSSURE, 41 S.C. 457, 487, 19 S.E. 926, 942 (1894)

C. Rule 22(b) Required Payment of Funds Into Court

Regarding "Issue D" On September 12, 2008, Respondent filed an interpleader complaint stating he was depositing the funds in question with the court. Despite Respondents' statement in his complaint, Respondent never deposited the funds with the court. Furthermore, despite requests to do so by the court (e.g. Judge Barber's hearing on May 7, 2012) Respondent failed to deposit the funds with the court despite the court's requests and his statements in his own complaint. Respondent fails to address these facts.

In "Issue D" Rakowsky continues to ignore Rule 22(b), of the Federal Rules of Civil Procedure not making any mention of it, or any other authority, concerning

payment into court in an interpleader action. Yet, the rule is universal, followed in all courts: "A proper deposit or bond is a jurisdictional prerequisite to bringing an interpleader. . . .The stakeholder invoking interpleader *must deposit* the largest amount for which it may be liable in view of the subject matter of the controversy." *U.S. Fire Ins. Co. v. Asbestospray Inc.*, 182 F.3d 201, 210 (3d Cir. 1999) (emphasis added).

D. No Basis for Legal Fees

In "Issue E" Respondent Rakowsky cites no authority for the award of legal fees and, indeed, settled law is to the contrary. In the initial brief, we cited *First Union Nat. Bank of South Carolina v. FCVS Communications*, 328 S.C. 290, 293, 494 S.E.2d 429 (1997), where our Supreme Court reversed an award of counsel fees in interpleader litigation observing: "we reverse the Court of Appeals' ruling that Bank was entitled to attorney's fees as an innocent stakeholder in this case. Attorney's fees are not recoverable unless authorized by contract or statute." In the case at bar, legal fees were not authorized under contract ***(emphasis added).***

Rakowsky's only other issue is that the lack of contractual authority was "not preserved." There is no issue raised concerning the timeliness of the appeal or law of the case. Rather, although Appellants *opposed* the motion, Rakowsky says that a Rule 59(e) motion was required. Again, he is wrong.

"Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not ruled upon." *Bailey v. Segars*, 346 S.C. 359, 365, 550 S.E.2d 910 (S.C. App. 2001), cert dismissed 354 S.C. 57, 579 S.E.2d 605 (S.C. 2003); see also *Padgett v. Colleton County*, 383 S.C. 431, 679 S.E.2d 533 (S.C. App. 2009) ("A review of the trial judge's ruling on this issue and the colloquy immediately preceding it, however, indicates Padgett's argument regarding agency liability was both raised to and ruled upon by the trial court."); *Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939) ("In matters of appeal, so far as it appears, all that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower Court and passed upon by that Court.").

To the extent that it is claimed by Respondent that the issue should have been raised in the malpractice action, Appellants find this assertion puzzling as Respondent Rakowsky filed to be awarded legal fees in the interpleader action. Rakowsky both filed the interpleader action and sought legal fees in the interpleader action and the Court granted them in the interpleader, holding Rakowsky "is entitled to his fees and costs for bringing this action to conclusion."

"What does that have to do with the malpractice case? Fees were sought through the interpleader by Rakowsky not the malpractice case.

Obviously, the issue was raised by Respondent and ruled upon by the trial court when it awarded Rakowsky legal fees in the interpleader case despite the fact the representation contracts clearly documented Rakowsky had not met the criteria necessary to receive legal fees. The record on appeal in this case is sufficient for appellate review.

Inasmuch as an award of legal fees in interpleader litigation is precluded by *First Union Nat. Bank* and even under the more liberal federal rule, the award must be reversed.

E. Despite Respondents Claims to the Contrary in "Issue F", Appellants are Entitled to Compensation for the Loss of their Funds

Again ignoring pertinent legal authority, Rakowsky contends that the Appellants should not receive compensation for the period in which they were deprived of their funds. *Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996) holds to the contrary. Runyon is the prevailing authority on this matter.

CONCLUSION

For the reasons stated in the initial brief and in this brief, the judgment should be reversed and the cause remanded for further proceedings.

CONCLUSION

For the reasons stated in the initial brief and in this brief, the judgment should be reversed and the cause remanded for further proceedings.

Dated: January 11, 2016

Respectfully submitted,

Michael G Sribnick, MD, JD
3 Kenilworth Avenue
Charleston, SC 29403
(843)789-3504
Email: michael.g.sribnickmdjdllc@gmail.com
Attorney for Plaintiffs-Appellants, Irene Santacroce, Rodney Lail, Estate of Doris Holt

James B. Spencer
Box 183
7001 Saint Andrews Rd.
Columbia, SC 29212
(803) 414-0889

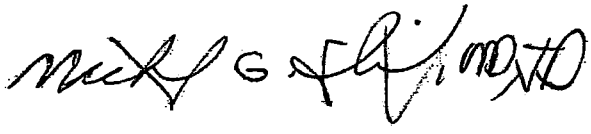
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 11, 2016, the document described below, was(were) served on all parties of record in this case by mailing a copy, by US mail or by courier.

Documents Served: **JOINT REPLY BRIEF OF APPELLANTS**

Parties Served:

Desa Ballard, Esquire
Ballard and Watson, Attorneys at Law
PO Box 6338
West Columbia, SC 29171



Michael G. Sribnick, M.D., J.D., LLC
3 Kenilworth Avenue
Charleston, S.C. 29403
Phone: (843) 789-3504
Fax: (843) 720-8907
michael.g.sribnickmdjdllc@gmail.com