

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY
R. SCOTT SPROUSE, CIRCUIT COURT JUDGE

Case No. 2015-CP-36-0636

Arthur L. Jayroe, Jr.,

Appellant,

v.

Newberry County,

Respondent,

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OCT 26 2016

SC Court of Appeals

Appellate Case No. 2016 – 002045

MEMORANDUM REGARDING IMMEDIATE APPEALABILITY

In the underlying matter, Appellant Arthur L. Jayroe, Jr. (“Appellant”) filed a complaint against Respondent Newberry County (“Respondent”) alleging fraud upon the court, and seeking in part a remedy of language being struck from an order issued in previous litigation. By order of the Honorable R. Scott Sprouse dated July 26, 2016, Appellant was denied the ability to conduct depositions of Wayne Adams, Jay Tothacer, Dirk Aydlette, Buddy Livingston, and Sen. Ronnie Cromer. It is undisputed that all five individuals that Appellant sought to depose have direct, personal knowledge regarding the facts and circumstances that form the basis of Appellant’s pending cause of action for fraud on the court. Nevertheless, the depositions were opposed by the

Respondent, and the Court granted a motion to quash the notices related thereto, based on an interpretation of Rule 30(a)(2), SCRC. ¹

Appellant acknowledges that the order in question is an interlocutory order and not a final judgment. While finality is a general requirement of appealability, certain interlocutory orders are immediately appealable, and Appellant is informed and believes the underlying order in this matter meets the criteria to allow for immediate consideration on appeal. Appellant now responds to the Court's request for a memorandum regarding that issue.

Since there are no specialized statutes applicable to this order, immediate appealability will depend on whether the order falls within one of the several categories of appealable orders addressed by S.C. Code § 14-3-330. *Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464 (2006). Section 14-3-330(2) states that appellate courts will review any intermediate order "affecting a substantial right." Ordinarily, a "discovery order" is not immediately appealable. *See Grosshuesch v. Cramer*, 377 S.C. 12, 659 S.E.2d 112 (2008). However, section 14-3-330(2) requires the appellate court to "focus on the effect of the order, not the label given to the motion or to the order granting it." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 705 S.E.2d 475, 478 (Ct.App.2011).²

The effect in this underlying matter is obvious and significant, in part because it is an action based on an alleged fraud by Defendant/Respondent. Fraud is treated differently than other causes of action, which does not end with the heightened pleading particularity required by the rules of

¹ The above-captioned appeal was filed as a companion appeal (Appellate Case No.: 2016-002047) from another order issued on October 12, 2016, that one denying discovery sought by Appellant from Sen. Cromer, a third party to the underlying action, based on a legislative privilege assertion.

² That opinion also cited to other instances in which "Our courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability." *Thornton* at footnote 6.

civil procedure. Rule 9(b), SCRPC. Upon presentation of the claim, a plaintiff must not only prove each of the numerous elements of the claim, but also to do so by “clear, cogent and convincing evidence.” *M. B. Kahn Const. Co., Inc. v. South Carolina Nat. Bank of Charleston*, 271 S.E.2d 414, 275 S.C. 381, 385 (1980).

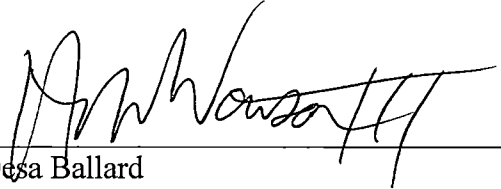
Under those circumstances, “when fraud is charged, much latitude is allowed in the admission of evidence on that issue.” *Allen-Parker Co. v. Lollis*, 257 S.C. 266, 185 S.E.2d 739 (1971). Our courts have long recognized the difficulties associated with presenting a claim for fraud. “Fraud assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.” *Sullivan v. Calhoun*, 117 S.C. 137, 139, 108 S.E. 189 (1921) (cited in *Zinn v. CFI Sales & Mktg., LTD*, 415 S.C. 93, 780 S.E.2d 611, 620-621 (Ct.App.2015)). All Appellants wants, but needs, to do is discover the facts and let them “bear heavily upon the conscience” without being relegated to participation in a trial by ambush and surprise.

Based on the referenced law of appealability and the particular circumstances of this case involving allegations of fraud, it becomes easier to see the predominant actual effects caused by a “mere discovery order” that Appellant seeks to have corrected. Precluding the deposition of five knowledgeable witnesses precludes meaningful discovery for Appellant, especially for an action that requires a breadth and depth of proof greater than that necessary to prosecute more common civil claims, and therefore precludes an ability to fairly litigate his claim. The effect of the order, which the case law identifies as paramount over its form, is to discontinue the claim and Appellant’s reasonable opportunity to proceed in earnest. The claim has been neutered and

rendered a mere formality awaiting eventual dismissal upon an artificial infirmity of proof, accelerated to that end despite the underlying facts and circumstances of the claim that should be made available for consideration.

As such, Appellant contends the order from which this appeal arises presents issues of substance and importance that justify immediate review by this Court within the confines of statutory and case law authority to do so.

Respectfully submitted,



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ATTORNEYS FOR APPELLANT
ARTHUR L. JAYROE, JR.

October 24, 2016

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IN THE COURT OF APPEALS

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CERTIFICATE OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on October 24, 2016, I served a copy of the **Memorandum Regarding Immediate Appealability** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

**Derwood Aydlette III, Esquire
Gignilliat Savitz & Bettis LLP
900 Elmwood Avenue, Suite 100
Columbia, South Carolina 29201**

Beth Cogan
Beth Cogan, Paralegal

October 24, 2016



Ballard & Watson
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PERSISTENT. UNWAVERING.

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October 24, 2016

Via U.S. Mail

The Honorable Jenny Abbot Kitchings
South Carolina Court of Appeals Clerk of Court
Post Office Box 41629
Columbia, South Carolina 29211

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SC Court of Appeals

Re: *Arthur L. Jayroe, Jr. v. Newberry County*
Appellate Case No.: 2016-002045

Dear Ms. Kitchings:

Enclosed for filing with your office, please find the original and one copy of the Memorandum Regarding Immediate Appealability and Proof of Service for the above-referenced matter. Please clock and return the clocked copies in the self-addressed, stamped envelope enclosed.

By copy of this letter and as evidenced by the Proof of Service, same has been served upon counsel for the Respondent. Thank you for your time in this matter. If you have any questions please do not hesitate to contact me.

With warm personal regards, I am,

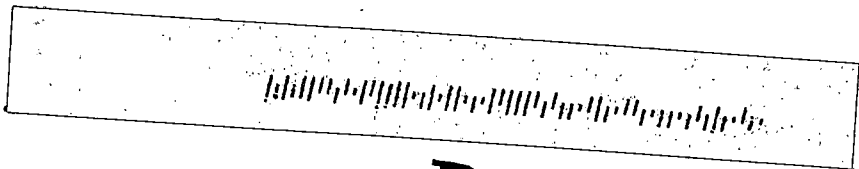
Sincerely yours,

Beth Cogan, Paralegal
beth@desaballard.com

cc: Via U.S. Mail
Dirk Aydlette III., Esquire
Art Jayroe (via email)



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