

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
In The Circuit Court

Jocelyn Newman, Circuit Court Judge

Appeal No.: 2017-000198

RECEIVED

MAR 20 2017

Amy Potts.....Respondent

SC Court of Appeals

v.

McCarty Enterprises, LLC, John Miles McCarty, Audrey S. McCarty, a/k/a Audrey J. McCarty and Jane Doe

.....Appellants.

RETURN TO RESPONDENT’S MOTION TO DISMISS

Respondent, Amy Potts, by and through her husband/counsel, Frank Potts, Esq., has moved to dismiss Appellants’ appeal asserting that it is not a final order and, thus, not appealable.

As Appellants’ counsel stated to Respondent’s counsel in her January 4, 2017, email: “I believe that since the Judge struck our Answer that appeal at this stage is appropriate under S.C. Code Ann. 14-3-330(2).” (See attached **Exhibit A**). Further, Appellants noted in the actual Notice of Appeal, “[p]ursuant to S.C. Code Ann. 14-3-330(2), [Appellants] appeal the September 28, 2016, judgment of the Honorable Jocelyn Newman striking Defendants’ Answer and denying other relief”

As Respondent’s own exhibits to her Motion show, Judge Newman’s Form 4 Order states, “Plaintiff’s Motion to Strike Amended Motion to Dismiss **and Answer to Amended**

Complaint is GRANTED.” (Respondent’s Motion, Ex. A5). Judge Newman then denied the Appellant’s Motion for Reconsideration. (Respondent’s Motion, Ex. A7). Furthermore, the transcript provided further supports the Court’s Order as Judge Newman said on the record that she was striking the Appellants’ Answer and finding them in default. (Respondent’s Motion, Ex. A10).

“Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code Ann. § 14-3-330 (1976 & Supp. [2002]).” *Woodard v. Westvaco Corp.*, 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995), *overruled on other grounds Sabb v. South Carolina State University*, 350 S.C. 416, 567 S.E.2d 231 (2002).

Under Section 14-3-330(2), this Court may “review upon appeal (2)[a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.”

As such, this matter is clearly appealable pursuant to S.C. Code Ann. §14-3-330(2), because it is reviewable as:

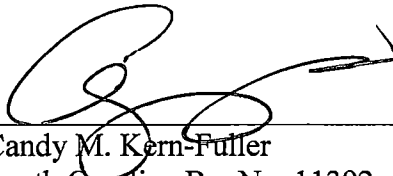
*(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) **strikes out an answer or any part thereof or any pleading in any action;***

(Emphasis added).

Accordingly, Appellants aver that their appeal should not be dismissed and the merits of such should be heard by this Court.

CONCLUSION

For the reasons stated, this Court should deny Respondents' motion and proceed with Appellants' appeal.



Candy M. Kern-Fuller
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March 15, 2017

ATTORNEY FOR APPELLANTS

Exhibit A

Candy M. Kern-Fuller, Esq.

From: Candy M. Kern-Fuller, Esq. <candy@upstatelawgroup.com>
Sent: Wednesday, January 4, 2017 4:52 PM
To: 'Potts, Frank'
Subject: RE: Emailing: Protection Granted Saluda Co.pdf Fax Received Yesterday McCarty

I believe that since the judge struck our Answer that appeal at this stage is appropriate under S.C. Code Ann. 14-3-330(2). I have 30 days to file our Notice of Appeal (2/3). My brief would then be due 30 days after that. (3/6). So, I am simply asking for another 6 weeks because I am already on protection in all Courts for that time.

If you cannot consent, I understand, I simply wanted to clarify my reasoning and request.

Candy Kern-Fuller, Esq.
Upstate Law Group, LLC
200 East Main Street
Easley, South Carolina 29640
(864) 855-3114
(864) 855-3446 (facsimile)
** CERTIFIED MEDIATOR AND ARBITRATOR FOR OVER 15 YEARS **

CONFIDENTIALITY NOTE: THIS EMAIL WAS SENT FROM A LAW FIRM. IT MAY CONTAIN PRIVILEGED OR CONFIDENTIAL INFORMATION AND IS INTENDED SOLELY FOR THE USE OF THE PERSON(S) NAMED ABOVE OR THE PERSON(S) WHO IS THE INTENDED RECIPIENT OF THE MESSAGE. IF YOU ARE NOT AN INTENDED RECIPIENT OF THIS EMAIL, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION OR DUPLICATION OF THIS E-MAIL IS PROHIBITED AND THAT THERE SHALL BE NO WAIVER OF ANY PRIVILEGE OR CONFIDENCE BY YOUR RECEIPT OF THIS TRANSMISSION. IF YOU HAVE RECEIVED THIS E-MAIL IN ERROR, PLEASE NOTIFY US BY COLLECT TELEPHONE CALL OR FAX TO THE NUMBER INDICATED ABOVE.

-----Original Message-----

From: Potts, Frank [mailto:fpotts@ogc.sc.gov]
Sent: Wednesday, January 4, 2017 4:08 PM
To: candy@upstatelawgroup.com
Subject: RE: Emailing: Protection Granted Saluda Co.pdf Fax Received Yesterday McCarty

Dear Ms. Kern-Fuller,
I cannot consent to your request for an extension until April 17, 2017 to file an Appellant's brief because Judge Newman's ruling is not appealable until after a judgment is entered against your clients.
Frank S. Potts

-----Original Message-----

From: Candy M. Kern-Fuller, Esq. [mailto:candy@upstatelawgroup.com]
Sent: Wednesday, January 04, 2017 3:06 PM
To: Potts, Frank
Cc: paralegal@upstatelawgroup.com
Subject: FW: Emailing: Protection Granted Saluda Co.pdf Fax Received Yesterday McCarty

Dear Mr. Potts:

I received this grant of protection request today right after I received Judge Newman's denial of our motion for reconsideration. Obviously, my clients intend to appeal Judge Newman's ruling. As such, my briefing will fall right in the middle of my surgery protection.

Pursuant to SCRCP 11, I would respectfully request your consent to seek an extension until April 17, 2017 to file Appellant's brief as that will be 30 days after my protection ends.

Please advise. Thank you,

Candy Kern-Fuller, Esq.
Upstate Law Group, LLC
200 East Main Street
Easley, South Carolina 29640
(864) 855-3114
(864) 855-3446 (facsimile)

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-----Original Message-----

From: Susan Lockwood [mailto:susan@upstatelawgroup.com]
Sent: Wednesday, January 4, 2017 2:07 PM
To: Candy@upstatelawgroup.com
Subject: Emailing: Protection Granted Saluda Co.pdf Fax Received Yesterday McCarty

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PROOF OF SERVICE

I certify that I have served the Appellant's Motion to Accept Response to Respondent's Motion to Dismiss Out of Time and Appellant's Response to Respondent's Motion to Dismiss on Amy Potts, by depositing a copy of it in an envelope via the United States Mail, Certified Mail, Return Receipt Requested, with proper postage affixed thereto, on March 15, 2017, addressed to her attorney of record:

Mr. Frank S. Potts
State Fiscal Accountability Authority
1201 Main Street
Suite 350 (Capitol Center)
Columbia, SC 29201

And the Clerk for the Court of Appeals:

The Honorable Jenny Abbott Kitchings
Clerk of Court of the Court of Appeals
P.O. Box 11629
Columbia, SC 29211



Candy Kern-Fuller, Esq. (SC Bar No. 11392)

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ATTORNEY FOR APPELLANT

March 15, 2017

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