

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

**RECEIVED**

JUL 13 2017

The Honorable Carmen T. Mullen, Circuit Court Judge

**SC Court of Appeals**

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Appellate Case No. 2017-000882

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In Re: Eleanor McCarthy Lenahan Trust under agreement Dated July 12, 2001.

Kathleen Suzanne Heslin and Maureen Theresa Mosley, in their capacities as  
Cotrustees of the Eleanor McCarthy Lenahan Trust under agreement  
dated July, 12, 2001.....Appellants,

v.

Mary Kathleen Lenahan, individually and in her capacity as Trustee of the  
Art. X(35) MKL Trust Share UAD 071201, Jean Marie Qualliu, Joan Eleanor  
DeMaio, and Christine Ann Lenahan.....Respondents.

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**MOTION TO DISMISS APPEAL  
AND MEMORADUM IN SUPPORT**

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## **MOTION**

Respondents Mary Kathleen Lenahan, individually and in her capacity as Trustee of the Art. X(35) MKL Trust Share UAD 071201, and Jean Marie Qualliu respectfully move this Court pursuant to Rule 240, SCACR, dismissing the Appellants' appeal of the Supplemental Order of the Honorable Carmen T. Mullen dated March 14, 2017 because the Supplemental Order is an interlocutory order stemming from the Circuit Court's grant of partial summary judgment to the Respondents and is not immediately appealable. Additionally, Respondents move to dismiss this appeal on the grounds that Appellants did not appeal the Circuit Court's initial Order filed February 3, 2017 granting Respondents' Motion for Partial Summary Judgment and that Order stands as the law of the case, making this appeal moot.

## **MEMORANDUM**

### **STATEMENT OF THE CASE**

This matter is an attempt by trustees to disinherit two beneficiaries of a family trust as punishment for filing letters of complaint with the South Carolina Office of Disciplinary Counsel (the "ODC"). The gravamen of Appellants' complaint is that Respondents allegedly violated a no contest restriction contained in the Fourth Amendment and Restatement of Trust Agreement of Eleanor McCarthy Lenahan, dated February 22, 2012, (the "Trust Agreement") as well as a private agreement between the parties, defined as the Agreement and Release in the Petition, by filing letters of complaint with the ODC about the Respondents' counsel Douglas Delaney. Specifically, Paragraph 31 of Appellants' Petition and the entire first cause of action for a declaratory judgment (Paragraphs 33 through 36) allege that Respondents' actions, including their communications with the ODC, constituted and constitute a violation of Article XI of the Trust Agreement. In addition, Paragraph 32 of the Petition and the entire second cause of action

for breach of contract (Paragraphs 37 through 41) contend that the “proceedings” initiated by Respondents in the ODC constituted and constitute a violation of the Agreement and Release.

On November 11, 2016, Respondents moved for partial summary judgment on Petitioners’ second cause of action and requested a determination by the Court that Respondents’ submission of complaints regarding Appellants’ counsel Douglas Delaney with the ODC did not and could not violate a trust agreement’s no contest restriction justifying Petitioners’ removal of Respondents as trust beneficiaries and did not breach a private agreement between Petitioners and Respondents. Following a hearing on February 2, 2017, the Circuit Court granted Respondents’ Motion for Partial Summary Judgment by a Form 4 Order entered February 3, 2017.<sup>1</sup> On February 10, 2017, Appellants filed a Notice of Motion and Motion for Reconsideration, Alteration and/or Amendment and listed five issues or alleged errors, including concerns regarding the lack of specific grounds for granting Respondents Motion for Partial Summary Judgment and Appellants’ confusion regarding how to proceed in the action based on the Circuit Court’s grant of partial summary judgment to Respondents at the same time as the grant of Appellants’ Motion to Amend Petition. After considering Appellants’ motion and Respondents’ memorandum in response, along with a proposed order, the Circuit Court entered a Supplemental Order on March 14, 2017. Appellants served their Notice of Appeal appealing “the Supplemental Order of the Honorable Carmen T. Mullen dated March 14, 2017” (Notice of Appeal at Page 1) on April 5, 2017.

Respondents move to dismiss this appeal because this is an improper interlocutory appeal of a supplemental order granting partial summary judgment to Respondents. This interlocutory

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<sup>1</sup> Judge Mullen’s Form 4 Order granted Appellant’s Motion to Amend Petition and Respondents’ Motion to Amend Answer as well.

appeal does not meet an exception granted by Section 14-3-330 of the South Carolina Code (Supp. 2009). Additionally, Appellants have appealed only the Supplemental Order and not the underlying Order dated February 3, 2017. Accordingly, Respondents contend that the decisions stated in the February 3, 2017 stand and this appeal is moot.

### ARGUMENT

An interlocutory order not governed by a statute authorizing the appeal is not immediately appealable unless it fits into one of the categories listed in Section 14-3-330 of the South Carolina Code (1976 & Supp. 2009). *Thornton v. South Carolina Electric & Gas Corp.* (*SCE & G*), 391 S.C. 297, 705 S.E.2d 475 (S.C. App., 2011), citing *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). Section 14-3-330 sets out the Appellate jurisdiction in law cases:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
- (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;
- (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
- (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

This Court has recently clarified the limits imposed on interlocutory appeals that do not meet a clear exception from Section 14-3-330 as follows:

In keeping with precedent, we narrowly construe section 14-3-330 because immediate appeals of various orders generally have not been allowed. *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709. Indeed, our supreme court has cautioned that "[p]iecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial." *Id.*... Our supreme court has narrowly defined an order "involving the merits" as an order that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Mid-State Distribs., Inc.*, 310 S.C. at 334, 426 S.E.2d at 780 (quoting *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988))... Therefore, because the order in this case does not bring the litigants to "the end of the road" and requires further action by the family court, we find the order is not immediately appealable under subsection 14-3-330(1). See *Mid-State Distribs., Inc.*, 310 S.C. at 334-35, 426 S.E.2d at 780...

"Immediate appeals under subsection (2) have been allowed in situations whe[n] the substantial right could not be vindicated on appeal after the case." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). "Generally [subsection (2)] has only been used when the trial order affected the 'mode of trial' because if those orders are not immediately appealed, no appellate review is available to correct any error." *Id.* When a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, the order is immediately appealable. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000).

*Stone v. Thompson*, Appellate Case No. 2014-001488, Opinion No. 5459 (S.C. App., 2016).

Since the Supplemental Order appealed in this case does not fit into any of the categories, it is not immediately appealable.

Additionally, this Court has examined the Section 14-3-330 exceptions in a substantially similar procedural context as this case when it determined "whether an order than grants a 12(b)(6) motion yet simultaneously grants leave to amend the pleadings is immediately appealable" in *Tillman v. Tillman*, Appellate Case No. 2015-001291, Opinion No. 5493 (Ct.

App. June 14, 2017). In concluding that the order at issue was not immediately appealable and dismissing the appeal, this Court held as follows:

To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly, eyeing the nature and effect of the order, not merely its label. If we were to hold otherwise and interpret the order as denying amendment, we would be left with the clumsy result of allowing appeal of the motion to dismiss to proceed, but is missing the appeal of the detail of the motion to amend. While we can review an interlocutor order joined with an appealable issue, to do so here would work a false efficiency, given the lawsuit from which the appeal was spun off remains to be heard in circuit court...Appellant's rights have yet to be finally determined by the circuit court. Appellant has not reached the end of the road, however long and winding he may have made it. The order is not immediately appealable.

*Id* (internal citations omitted).

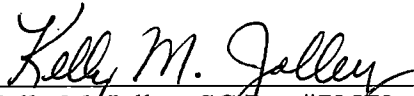
In this case, as in *Tillman*, the Circuit Court entered an order ending one portion of the case – by granting Respondents' Motion for Partial Summary Judgment – while simultaneously granting the Appellants' Motion to Amend the Petition to add a claim for Defamation also based solely on Respondents allegedly made in their privileged communications with the ODC. Judicial economy as well as settled law as set forth above require the dismissal of this appeal so that the remaining claims in the underlying litigation may be heard. If an appeal is ultimately necessary, it should encompass all claims in the pending case and especially those claims all relying on the same communications to the ODC.

### CONCLUSION

Accordingly, Respondents respectfully request that this Court issue an Order dismissing the Appellant's appeal of the Supplemental Order.

Respectfully submitted,

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Date: July 12, 2017