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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2017-000882

**RECEIVED**  
JUL 24 2017  
SC Court of Appeals

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

Kathleen Suzanne Heslin and Maureen Teresa 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,

Of Whom Mary Kathleen Lenahan and Jean Marie Qualliu are Respondents.

**RETURN TO MOTION TO DISMISS APPEAL AND  
MEMORANDUM IN SUPPORT**

In response to the Motion to Dismiss Appeal and Memorandum in Support, dated  
July 12, 2017 and filed by Respondents Mary Kathleen Lenahan and Jean Marie Qualliu, the  
Appellants offer as follows:

## APPELLANTS' STATEMENT OF THE CASE

Respondents Mary Kathleen Lenahan and Jean Marie Qualliu (“Respondents”) are beneficiaries of the Eleanor McCarthy Lenahan Trust (“Trust”), who breached the “No Contest” Restriction contained in the Trust Agreement by objecting to the actions taken by the Appellants, as Trustees; the Respondents attempted to shield some of their objections by couching them in letters delivered to the S.C. Office of Disciplinary Counsel (ODC) for the ostensible purpose of complaining about the Appellants’ counsel, Douglas Delaney.<sup>1</sup> These particular objections were made and delivered to the ODC immediately following the Respondents’ execution of a written agreement entered into with the Appellants (“Agreement and Release”), in violation of both the letter and spirit of the Agreement and Release.<sup>2</sup> As a result of the Respondents’ actions, the Appellants subsequently filed the underlying lawsuit seeking declaratory relief as to the Respondents’ violation of the Trust’s “No Contest” Restriction and asserting breach of contract for the Respondents’ breach of the Agreement and Release.

On September 28, 2015, shortly after commencement of the lawsuit, the Respondents moved for dismissal, under 12(b)(6), SCRPC, arguing that Lawyer Disciplinary Enforcement

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<sup>1</sup>Delaney never represented the Respondents and, in fact, each Respondent had her own, separate counsel (i.e., Attorneys Rick Haight and Timothy Corrigan) during dealings and negotiations with Delaney.

<sup>2</sup>Respondent Lenahan objected to, among other things, the Appellants’ creation of the MKL Trust Share, despite the fact that Respondent Lenahan had just signed the Agreement and Release, which reflected her express approval of the MKL Trust Share. Significantly, these objections have recently reappeared in the form of counterclaims asserted against the Appellants in the underlying lawsuit.

Rule 13, under Rule 413, SCACR, protected their contest and objections, and rendered Respondents immune from the Appellants' lawsuit; this motion was denied by the circuit court. A year later, the Respondents repackaged their 12(b)(6) argument into a motion for partial summary judgment, arguing, again, that Rule 13 shields the Respondents' contest and objections, preventing application of the "No Contest" Restriction and defeating any claim that such violated the Agreement and Release. Notwithstanding the presence of disputed issues of fact, the circuit court granted the motion for partial summary judgment, via a Form 4 order dated February 3, 2017.

The Appellants filed a timely motion for reconsideration, alteration and/or amendment, dated February 10, 2017, for the purpose of, among others, ensuring that the circuit court had ruled on all issues and arguments before it, and for clarification of what had been ordered. In response to Appellants' motion, the circuit court issued a Supplemental Order, dated March 14, 2017; although the circuit court, in its Supplemental Order, held that the Respondents' objections constituted a "contest," it nevertheless went on to hold that the objections did not and could not violate the "No Contest" Restriction of the Trust Agreement, and, further, that the Respondents' contest and objections could not serve as grounds for breach of the parties' Agreement and Release. The Appellants timely filed their Notice of Appeal thereafter, on April 5, 2017.

### **ARGUMENT**

- 1. The Appellants timely filed an appropriate post-trial motion and, after receiving a ruling on same, filed their Notice of Appeal.**

As preliminary matter, the Respondents' argument that the within appeal should be dismissed because the Appellants did not appeal from the circuit court's Form 4 order misconstrues Rule 59, SCRPC.

A timely post-trial motion, including a motion to alter or amend the judgment under Rule 59(e), stays the time for an appeal for all parties until receipt of written notice of entry of an order granting or denying such motion. *Elam v. S.C. Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004); *see also* Rule 203(b)(1), SCACR.

The February 3, 2017 Form 4 order was both unclear and failed to specifically rule on the issues raised by the Appellants. As the Supreme Court held in *Elam*, a party may wish to file a Rule 59(e) motion "when she believes the court has misunderstood, failed to fully consider or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id* at 24. Both of these scenarios apply in the instant case. Because the Form 4 order sets forth no explanation or reasoning for the court's grant of partial summary judgment, the Appellants believed that the circuit court had misunderstood and/or failed to fully consider the arguments, or had perhaps failed to rule on all the issues, especially given that the Form 4 order appears to conflict with the same court's previously-issued Form 4 order, dated April 18, 2016, without any explanation for the differing rulings. Further, at least one issue raised by Appellants was not addressed and ruled on in the February 3 Form 4 order.<sup>3</sup> Absent clarification, it would

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<sup>3</sup>For example, the Form 4 order does not address or rule on the Respondents' failure to offer evidence supporting their claim that they had probable cause for their objections, which is a critical issue for the underlying claims and defenses (especially given that the Respondents have asserted

have been impossible to mount a proper appeal from the circuit court's ruling. Indeed, it seems that the circuit court conceded that the Form 4 order was unclear and/or incomplete, given that the Supplemental Order it issued thereafter specifically states that "Petitioners' arguments [issues raised in the motion to reconsider] and this Court's response to each are set forth below". Once the Appellants had the circuit court's Supplemental Order confirming that it had addressed all the issues raised and clarifying its rulings, the Appellants timely filed their Notice of Appeal. The Respondents' argument to the contrary is unavailing.

**2. The appeal satisfies the requirements set forth under S.C. Code Ann. Section 14-3-330(1).**

The dictates of the S.C. Code for appeals have been met and satisfied by the Appellants in this case.

Whether a grant of summary judgment is immediately appealable is determined by S.C. Code Ann. Section 14-3-330. *Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990). "Generally, orders granting partial summary judgment may be immediately appealable under either the 'involving the merits' or 'substantial right' categories of section 14-3-330(1) and (2)©." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011).

Section 14-3-330(1) provides for appellate review of an "intermediate judgment, order or decree in a law case involving the merits." An order involves the merits when it

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counterclaims against the Appellants.) Moreover, the Form 4 order does not address that the Respondents' argument in this regard – supported or not – is a disputed issue of fact.

finally determines “some substantial matter forming the whole or part of the same cause of action or defense . . .” *Link* at 6, quoting *Jefferson by Johnson v. Gene’s Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988). “A summary judgment ruling . . . fits within this *Jefferson* definition.” *Id* at 6.

The Supplemental Order involves the merits because it makes a final determination that the Respondents had probable cause (a fact issue) to mount their contest against the Appellants, despite a lack of any evidentiary support for such a finding. This ruling establishes for the remainder of the underlying lawsuit that the Respondents were justified in contesting and objecting to the Appellants’ actions as Trustees, without allowing the issue to be tried, and before the Appellants can even conduct discovery on the issue.<sup>4</sup> The merits of both the Appellants’ claims and the Respondents’ defense(s) are involved in the Supplemental Order and, thus, the criteria of Section 14-3-330(1) have been satisfied in this appeal.

**3. South Carolina Code Ann. Section 14-3-330(2)(c) applies in this case.**

Given the Supplemental Order’s ruling concerning the Appellants’ pleadings, S.C. Code Ann. Section 14-3-330(2)(c) applies to this appeal, as well.

Section 14-3-330(2)(c) provides for appellate review of an order that strikes out an answer or any part thereof or any pleadings in an action. An order affects a substantial right

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<sup>4</sup>The Beaufort County Master in Equity ruled, via Order dated July 13, 2016, that once the ODC matter concludes, the ODC complaints and any communications concerning the same will be discoverable. For this reason, the Appellants filed a motion to stay the underlying litigation until the ODC matter concludes, but the circuit court denied the motion via Form 4 order dated November 14, 2016.

by striking a pleading if such order removes a material issue from the case, thereby preventing the issue from being litigated on the merits. *Thornton* at 304. “An order striking a portion of a pleading is immediately appealable.” *P.J. Const. Co. v. Roller*, 287 S.C. 632, 633, 340 S.E.2d 564, 565 (Ct. App. 1986).

The Supplemental Order strikes out significant portions of the Appellants’ Petition (and Amended Petition) by holding that certain of the Respondents’ objections regarding the Appellants – by virtue of their inclusion in letters delivered to the ODC – did not violate the “No Contest” Restriction of the Trust Agreement and did not breach the parties’ Agreement and Release, thereby preventing these material issues from being litigated on the merits, as those particular grounds are no longer available. Accordingly, the criteria of Section 14-3-330(2)(c) are met in this case, as well.

From nearly the outset of the case, the Appellants have been hindered in their efforts to litigate their claims, by a ruling essentially preventing them from engaging in discovery until the ODC matter concludes, and a subsequent order refusing to stay the litigation until the ODC matter concludes. Now, the Appellants face a Supplemental Order which holds that, not only are the contest and objections made by Respondents to the ODC off limits, the Appellants have already been adjudged “at fault,” as it were, by virtue of the Order’s holding that the Respondents had probable cause to mount such a contest. Dismissing this appeal will thus not only critically hobble the Appellants, but will unfairly benefit the Respondents, for the remainder of the litigation.

**CONCLUSION**

In light of the foregoing, the Appellants respectfully request that this Court deny the Respondents' motion to dismiss the appeal.



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Attorneys for Appellants

July 21, 2017

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
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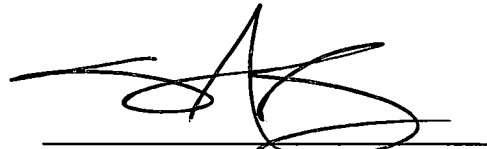
Of Whom Mary Kathleen Lenahan and Jean Marie Qualliu are Respondents.

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**PROOF OF SERVICE**

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I certify that I have served the Return to Motion to Dismiss Appeal and Memorandum in Support upon Respondents Mary Kathleen Lenahan and Jean Marie Qualliu by depositing a copy of same in the United States Mail, postage prepaid, on July 21, 2017, addressed to Respondents' attorney of record, Kelly M. Jolley, Esquire.



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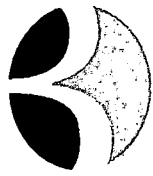
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JUL 24 2017

SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

**RE: In Re: Eleanor McCarthy Lenahan Trust under agreement dated July 12, 2001;  
Kathleen Suzanne Heslin and Maureen Theresa Mosley, et al. v. Mary Kathleen  
Lenahan, et al.  
Appellate Case No. 2017-000882**

Dear Ms. Kitchings:

Please find enclosed the original and one copy each of the Appellants' Return to Motion to Dismiss Appeal and Memorandum in Support, and a Proof of Service for same. Please file the originals and returned the clocked-copies to me via the enclosed, self-addressed stamped envelope.

Please note that the motion to dismiss appeal filed by the Respondents was unaccompanied by a proof/certificate of service, as required by Rule 240, SCACR, or a transmittal letter; accordingly, the Appellants are uncertain of the precise deadline for filing the within Return.

With kind, personal regards, I am

Sincerely,

BOLCHOZ LAW FIRM, PA

Sean Michael Bolchoz  
SENDER'S E-MAIL ADDRESS:  
SBOLCHOZ@BOLCHOZLAW.COM

SMB/tj  
Enclosures

cc: Kelly M. Jolley, Esquire (w/encl.)  
Douglas S. Delaney, Esquire (via email only to doug@delaneylawfirm.com) (w/out encl.)  
Kathleen Heslin (via email only to klheslin@yahoo.com) (w/out encl.)  
Maureen Mosley (via email only to mosley745@gmail.com) (w/out encl.)

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PO Box 828, Bluffton, SC 29910



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