

**THE STATE OF SOUTH CAROLINA**  
**In the Court of Appeals**

Appeal from Florence County  
Court of Common Pleas  
Michael G. Nettles, Circuit Court Judge

Case No. 2008-CP-21-2326

**RECEIVED**

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**SC Court of Appeals**

Marquette Johnson, as Mother Natural Guardian  
of D'Andre G., an infant under the age of 14 years.

Appellant/Respondent.

v.

Anu Chaudhry, M.D., McLeod Regional Medical Center,  
and Florence Women's Health.

Defendants.

Of Whom Anu Chaudhry, M.D.,  
and Florence Women's Health are

Respondents/Appellants.

**Appellants' Final Reply Brief of Respondents/Appellants**

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## ARGUMENT IN REPLY

**1. The Appellate Court may review the denial of the Defendants' motion for summary judgment on cross appeal of the orders on reconsideration.**

As the Plaintiff correctly notes in her brief, the denial of a motion for summary judgment is not directly appealable, citing Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994). And, if the Trial Court initially had denied the Defendants' motion for summary judgment, the Defendants would not have appealed from such an order. However, the Trial Court, in fact, granted the Defendants' motion, and thereafter, issued a series of orders on Plaintiff's repetitive motions for reconsideration that have effectively denied the motion. Unsatisfied with the Trial Court's rulings on her motions for reconsideration, the Plaintiff first noticed her appeal from those orders, and the Defendants then filed a cross appeal.

Notwithstanding the general rule as declared in Ballenger v. Bowen, the Supreme Court has indicated that it might, "as a matter of discretion, consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation, Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct.App.1994)...." Morris v. Anderson County, 349 S.C. 607, 564 S.E.2d 649, 651 (2002) (yet declining to review constitutional issue on denial of summary judgment). Similarly, the Supreme Court has exercised jurisdiction over a cross-appeal from a denial of a motion to dismiss, which generally is not immediately appealable, on the grounds of judicial economy:

An order that is not directly appealable may be considered if there is an appealable issue before the court. *Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct.App.2001). Here, an order in this case which is appealable is before the Court and, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy), we will consider State Farm's cross-appeal.

Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 623 S.E.2d 387, 390 (2005). See also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564 S.E.2d 94, 98 (2002) (“This Court reviews interlocutory orders when they contain other appealable issues.”); Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315, 317 (1978) (discussing consideration of interlocutory orders when appealable issue is before the court in order to avoid unnecessary litigation); Southeastern Housing Foundation v. Smith, 380 S.C. 621, 670 S.E.2d 680, 688 (Ct. App. 2008) (“[T]his Court may review an interlocutory order when the order is coupled with an appealable issue.”). In addition, the Appellate Courts occasionally have considered unappealable orders without addressing appealability. See 15 S.C. Jur. *Appeal and Error* § 70 (“The appellate courts occasionally consider unappealable orders without discussing appealability, but such “silent” considerations are not a ruling that the order is immediately appealable.”).

The Defendants respectfully submit that, to the extent that the Plaintiff first appealed seeking review of the Trial Court’s orders on the motions for reconsideration, the interests of judicial economy would be served by addressing the Defendants’ issues on cross appeal that are intertwined with those same orders.

**2. The Plaintiff did not timely submit an expert affidavit to avoid summary judgment.**

As to the Plaintiff’s accusation that the Defendants misrepresented facts to the Trial Court regarding when the Plaintiff first submitted her expert affidavit, the record will show that the Trial Court was aware that the Plaintiff submitted Dr. Oakes’ affidavit as a supplement to her first motion for reconsideration, on or about June 23, 2010.

Plaintiff directly addressed the issue of the timing of her supplemental submission of Dr. Oakes’ affidavit at the hearing on Defendants’ motion for reconsideration. [ROA 243;

9/17/10 Tr. p. 13, ll. 14-20.] In addition, the Trial Court's order denying that motion specifically recites that the affidavit was submitted as a supplement to the first motion for reconsideration. [ROA 25; Order, filed October 12, 2012, p. 3.]

Regarding the Trial Court's statement at the January 5, 2011, hearing on the Plaintiff's third motion for reconsideration, the Plaintiff did not make any effort to correct the Trial Court's recitation that the affidavit was submitted with the second motion for summary judgment. [ROA 330; 1/5/11 Tr. p. 18, ll. 15-16.] However, Defense Counsel already had acknowledged that the Plaintiff had submitted an affidavit with her motion for reconsideration. [ROA 328; 1/5/11 Tr. p. 16, ll. 16-19.]

Ultimately, the record indisputably shows that the Plaintiff did not name an expert in her tardy discovery responses; she did not submit any expert affidavit before or at the summary judgment hearing; and she did not submit any expert affidavit with her first motion for reconsideration. The Defendants maintain that the late submission as a supplement to the Plaintiff's first motion for reconsideration was not timely, and the affidavit still was untimely when filed with the second motion for reconsideration. Accordingly, the Trial Court should not have granted the motion for reconsideration of the order that had properly granted summary judgment to the Defendants because the Plaintiff did not have the requisite expert opinion to meet their burden of proof.

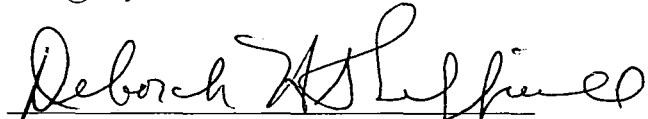
## **CONCLUSION**

WHEREFORE, based on the foregoing, the Defendants request that the Court reverse the Trial Court's order granting reconsideration and reinstate the order granting summary judgment.

Respectfully submitted,

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**July 31, 2012**

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Certification of Counsel

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



Deborah H. Sheffield

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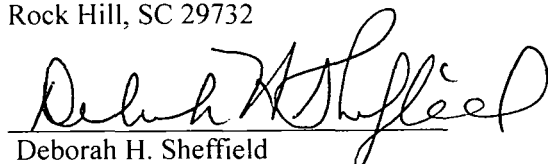
**Certificate of Service**

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I, Deborah Sheffield , attorney for the Respondents/Appellants, do hereby certify that on July 31, 2012, I served a copy of the Appellants' Final Reply Brief of Respondents/Appellants on Counsel for Appellants/Respondents, via U.S. Mail, first class, postage prepaid to the following address:

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