

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM KERSHAW COUNTY  
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

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Case No. 2019-000624

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**RECEIVED**  
MAY 23 2019  
SC Court of Appeals

Dottie R. Bell,

Appellant,

v.

John C. Bentley,

Respondent.

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APPEALABILITY MEMORANDUM OF RESPONDENT

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May 20, 2019

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## **ISSUE BEFORE THE COURT**

**WHETHER ORDER DENYING PLAINTIFF'S MOTION TO SUBSTITUTE A PARTY IS IMMEDIATELY APPEALABLE.**

### **STATEMENT OF FACTS**

Plaintiff filed this action on December 13, 2016 against Defendant alleging injuries as a result of a motor vehicle accident that occurred on or about February 20, 2014. Plaintiffs were unable to locate Defendant and, therefore, served him by publication on February 17, 2017. The affidavit of publication was filed more than two months later, on April 21, 2017. Plaintiff served State Farm as the underinsured motorist carrier through the South Carolina Department of Insurance on December 28, 2017.

On January 25, 2018, Defendant's counsel learned Defendant had passed away prior to the lawsuit having been filed – a fact that is undisputed. Defendant's counsel verbally informed Plaintiff's counsel the same day that Defendant was deceased and followed up with written confirmation via electronic mail. By January 30, 2018, Plaintiff's counsel advised he would have a personal representative appointed in short order, as no estate had been opened. Seven months later, on August 14, 2018, Bryan Caskey was named Special Administrator for purposes of this litigation.

On September 10, 2018, Plaintiff filed a Motion to Substitute Bryan D. Caskey, Esquire as Personal Representative or Real Party in Interest for Defendant pursuant to Rule 17(a), SCRPC. The Honorable DeAndrea Benjamin heard arguments from both parties and filed an Order dated October 16, 2018 denying Plaintiff's Motion with leave granted to serve the Administrator of Defendant's Estate. Under "order information", the judge indicated that her directives did not end the case.

Plaintiff served Mr. Caskey with the Summons and Complaint on October 19, 2018. It was not until December 5, 2018, that Plaintiff filed a subsequent Motion to Substitute Bryan D. Caskey, Esquire as Personal Representative or Real Party in Interest for Defendant. The Honorable Robert E. Hood heard arguments from counsel and issued an Order dated February 28, 2019 denying Plaintiff's Motion on grounds that she failed to substitute the party within a reasonable amount of time based on the totality of the circumstances and Rule 25, SCRPC.

On March 7, 2019, Plaintiff filed her Motion to Reconsider the Order Denying Plaintiff's Motion to Substitute Parties. Judge Hood denied Plaintiff's Motion to Reconsider on April 11, 2019. Again, under "order information" on the Form 4, Judge Hood indicated that his decision did not end the case.

Plaintiff filed her Notice of Appeal on April 16, 2019. The Clerk of Court for the Court of Appeals has requested the parties provide a memorandum of law to the Court discussing the appealability of Judge Hood's denial of Plaintiff's motions.

## LAW

An appeal may be taken from any final judgment, appealable order, or decision. Rule 201(a), SCACR. It is a fundamental rule of appellate procedure that a judgment or order must be final before it can be appealed. *See Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). In determining whether a matter is a final judgment or an interlocutory order that is not immediately appealable, the Supreme Court has stated that if there is some further act that must be done by a court prior to a determination of the rights of the parties, then the order is interlocutory and not immediately appealable. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't Health & Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010). Whether an order is final depends on the substance of the order. A final order "disposes of the whole subject matter of the action or

terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.” *Id.*, 387 S.C. at 267, 692 S.E.2d at 895.

Unless an exception is specified by statute, non-final or interlocutory orders are not immediately appealable. *See Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004). Whether a party may immediately appeal an order issued before trial is determined primarily by section 14-3-330 of the South Carolina Code. Such an order must generally fall into one of the several categories set forth in section 14-3-330 to be immediately appealable. *See Hagood, supra*. Section 14-3-330 of the South Carolina Code states:

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.

S.C. Code Ann. § 14-3-330.

## ARGUMENT

As a threshold matter, Respondent respectfully submits that because there is a nonexistent defendant, this action is a nullity, and therefore, no action is before the Court. *See McCullar v.*

*Estate of Campbell*, 381 S.C. 205, 627 S.E.2d 784 (2009) (holding an action brought against an estate that had been closed prior to the filing of the suit was a nullity because there could be no action against a nonexistent defendant); *see also Commercial & Savings Bank of Lake City v. Ward*, 146 S.C. 77, 143 S.E. 546 (1928) (where Court explained that an action must fail where suit is brought by a nonexistent plaintiff as “it is as if there was no plaintiff in the record and therefore no action before the court”).

If this Court recognizes the existence of a defendant in this case, which Respondent specifically denies, then Respondent respectfully states that the trial judge’s order to deny plaintiff’s motion to substitute counsel is not immediately appealable.

As an initial matter, Judge Hood’s Order does not finally determine this case. “If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory.” *Charlotte-Mecklenburg Hosp. Auth.*, *supra* (internal citations omitted). Further action by the trial court is required to finally determine the rights of Plaintiff, Defendant, and the UIM carrier. Defendant is entitled to be heard on whether Plaintiff’s case can continue through dispositive motions. Furthermore, the UIM carrier’s rights have not yet been determined to the extent it stands in the shoes of the Defendant. In short, this case has not yet reached its natural conclusion either by dismissal or trial. This fact was recognized by both Judge Benjamin and Judge Hood, who indicated on their orders that their decisions did not end the case.

In the event the Court hears the appeal, the case would eventually return to the trial court, and at that point, Defendant and the UIM carrier would still be required to file dispositive motions and/or the case would continue through trial. At that time, either party may appeal the outcome and any preserved issue before the Court. If this Court declines to hear Plaintiff’s appeal at this time, the case would continue in the same manner and Plaintiff would retain his right to have this

issue heard after the parties have obtained a final judgment. Therefore, Appellant's appeal is not ripe, and Respondent should have the opportunity to file and obtain a ruling on his dispositive motions before this issue is heard.

Judge Hood's Order is not immediately appealable pursuant to section 14-3-330(1). This subsection declares that appellate courts will review any intermediate order in a law case "involving the merits." As stated by our Supreme Court in *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993), an order "involving the merits" is one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Mid-State*, 310 S.C. at 334, 426 S.E.2d at 780 (internal citations omitted). The phrase "involving the merits" is narrowly construed in modern precedent. *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467-68 (2006). An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. *Mid-State*, 310 S.C. at 334-35, 426 S.E.2d at 780 (order denying motion to dismiss case based on lack of personal jurisdiction was not immediately appealable, as the litigant has "not arrived at the end of the road.").

In the present case, the trial court's order denying Plaintiff's motion to substitute a party does not involve the merits of this negligence case and further action is needed to determine the parties' rights. Even if this Court were to determine the order does involve the merits, the second part of 14-3-330(1) provides Plaintiff a mechanism by which this issue would be heard following a final judgment. The subsection provides 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." Therefore, this court may still review Judge Hood's Order upon the parties' obtaining a final judgment.

Judge Hood's Order is not immediately appealable because it does not affect a substantial right as required by section 14-3-330(2). This subsection has been narrowly construed, and the immediate appeal of various orders issued before or during trial generally has not been allowed. *Hagood, supra*. To be immediately appealable pursuant to section 14-3-330(2), the order must "in effect determine[] the action and prevents a judgment from which an appeal might be taken or discontinues the action." This Order in no way precludes Appellant from appealing a subsequent, and truly final judgment that fully determines the rights of all parties in this case.

Judge Hood's Order is not immediately appealable under section 14-3-330(3) because there was no special proceeding held. *See Allen v. Partlow*, 3 S.C. 417 (1872) (defining "special proceeding" as "any remedy other than an action or ordinary proceeding in a Court of justice, by which party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."). Likewise, the Order is not immediately appealable under 14-3-330(4) because it does not concern injunctions or receivers.

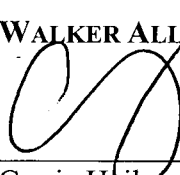
The Supreme Court has construed section 14-3-330 to serve the underlying policy favoring judicial economy by avoiding "piecemeal appeals." *Hagood*, 362 S.C. at 196, 607 S.E.2d at 709. Respondent respectfully asserts that this policy would not be served by deciding the merits of Plaintiff's appeal at this time.

### **CONCLUSION**

For the foregoing reasons, respondent respectfully requests that Appellant's Notice of Appeal should be dismissed.

Respectfully submitted,

**WALKER ALLEN GRICE AMMONS & FOY LLP**



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**ATTORNEYS FOR RESPONDENT**

May 20, 2019

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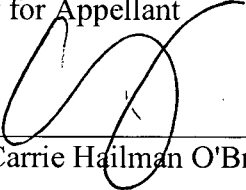
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PROOF OF SERVICE

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The undersigned attorney hereby certifies that a true copy of APPEALABILITY MEMORANDUM OF RESPONDENT in the above referenced case has been served upon opposing counsel by mailing a copy in an envelope properly addressed with postage prepaid this 20<sup>th</sup> day of May, 2019.

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May 20, 2019



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May 20, 2019

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
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**RECEIVED**  
MAY 23 2019  
SC Court of Appeals

Re: Dottie R. Bell v. John C. Bentley  
Case No.: 2019-000624

Dear The Honorable Kitchings:

Enclosed are the original and one copy of Respondent's Appealability Memorandum in the above-captioned matter. Please file the original with the Court, and return the copy, stamped "filed," in the enclosed self-addressed, stamped envelope.

Thank you for your time and attention to this matter.

With kindest regards,

**WALKER ALLEN GRICE AMMONS & FOY LLP**

*s/Carrie Hailman O'Brien*

Carrie Hailman O'Brien

CHO/acw

Cc: T. Jeff Goodwyn, Jr. *Atty for Appellant*

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