

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2017-CP-26-08135  
Appellate Case No.: 2019-001076

Jesse Cook,

Respondent,

v.

Edward Jenerette,

Appellant.

**RECEIVED**  
DEC 02 2019  
SC Court of Appeals

**RESPONDENT'S MEMORANDUM IN SUPPORT  
OF THE MOTION TO DISMISS**

Respondent Jesse Cook, by and through his undersigned attorney, respectfully submits this memorandum in support of the motion to dismiss.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

This case arose from a motor vehicular accident that occurred on December 16, 2014, wherein Respondent and his son, Benjamin, were seriously injured. The at-fault driver was the Appellant, Edward Jenerette. Less than one month thereafter, on January 14, 2015, Respondent's counsel, Scott Bellamy, sent a letter of representation on behalf of both Jesse and Benjamin Cook to Appellant's insurer, Traveler's Insurance Company ("Travelers"), which it received on January

14, 2015. Correspondence was exchanged between Attorney Bellamy and the adjuster, and on December 12, 2017, settlement not having been achieved, a civil action was filed in Horry County on behalf of the Cooks against Appellant, with copies being sent to his insurance carrier. The next day, Respondent's counsel provided the summons and complaint to the Sherriff's Department to serve the Appellant.

Service was never perfected on Appellant, an affidavit of non-service being executed on January 8, 2018. However, Respondent's counsel continued to negotiate with the adjuster for Travelers. On July 11, 2018, the case involving Benjamin Cook was settled for \$105,000. The injuries for Jesse Cook being more severe, Respondent's counsel and the adjuster focused on resolving that matter. Thereafter, on September 20, 2018, the adjuster informed personnel in Respondent's counsel's office that he had learned the civil action had been administratively dismissed by the Honorable William H. Seals, Jr. on September 11, 2018.

On November 28, 2018, Respondent's counsel filed a motion to restore this action pursuant to Rule 60(b)(1), SCRCF, based on mistake, inadvertence, or excusable neglect as well as the theory of estoppel. Following a hearing, the Honorable Larry Hyman issued an order restoring the case which was filed on May 6, 2019. By order dated June 25, 2019, Judge Hyman denied Appellant's motion for reconsideration. This appeal followed.

## **II. DISCUSSION**

Whether an order is immediately appealable is governed by statute. S.C. Code Ann. § 14-3-330. Section 14-3-330 sets forth the limited exceptions when a party may appeal an interlocutory decision—none of which apply in this case. Instead, this action is controlled by the default rule that a party must wait until a final judgment has been issued. Indeed, this State's jurisprudence definitely answers the appealability question in Respondent's favor.

In *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 402 S.E.2d 482 (1991), the South Carolina Supreme Court held an appeal from an order granting a motion to restore was not an order "involving the merits of the case or affect[ing] a substantial right," thus, it was not immediately appealable. *Id.* at 470, 402 S.E.2d at 483. The Shields filed a wrongful death lawsuit against three defendants after their son drowned in floodwaters that had accumulated in their yard. A settlement was reached with one of the defendants and the parties filed amended pleadings; however, no action was taken for nearly three years. The two remaining defendants filed a motion to dismiss for lack of prosecution, which was denied. Thereafter, the circuit court granted the Shields' motion to restore the case to the active docket, and the defendants appealed. The Supreme Court noted, "Avoidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order." *Id.* The Court concluded, "The decision on a motion to restore the case to the active docket is not a final judgment and is interlocutory and, therefore, not immediately appealable." *Id.*

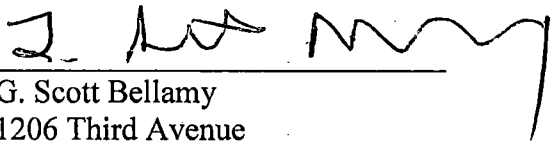
This Court also has rejected an appeal concerning an order granting relief from judgment pursuant to Rule 60(b), SCRCP, in conjunction with a motion to restore, citing *Shields* in reaching its decision. *Pocisk v. Sea Coast Const. of Beaufort*, 380 S.C. 584, 671 S.E.2d 98 (Ct. App. 2008). In *Pocisk*, the homeowners filed a lawsuit against the general contractor and others alleging defective construction. *Id.* at 586, 671 S.E.2d at 99. Initially, the parties settled, and the general contractor confessed judgment in exchange for the homeowners agreeing not to seek satisfaction of the judgment from him. *Id.* Judgement was entered, and after the contractor assigned his rights to the homeowners, they sought to recover from the contractor's insurance company. Thereafter, the insurance company filed a declaratory judgment seeking a declaration that it did not owe any duty to defend or indemnify. *Id.* at 586, 671 S.E.2d at 100. The court found the settlement

presumptively unreasonable, and therefore determined the insurer did not owe any duty to indemnify. *Id.* at 587, 671 S.E.2d at 100.

As a result, the homeowners filed a motion to vacate the consent judgment pursuant to Rule 60(b), SCRCP, and restore the case to the active trial roster. *Id.* The court initially denied the motion, but later reversed course, vacating the judgment and restoring the matter to the trial docket. *Id.* The general contractor appealed, and the Court of Appeals dismissed, holding the order was not appealable. *Id.* The court noted the contractor could appeal the decision at the conclusion of the case, and it cited *Shields* for the proposition that "the order granting Rule 60(b) relief does not affect a substantial right." *Id.* at 588, 671 S.E.2d at 100–01.

Based on *Shields* and *Pocisk*, this Court should dismiss Appellant's appeal because it is not immediately appealable. The circuit court's order restoring this matter to the docket is patently interlocutory, as Appellant has yet to file an answer. The circuit court's order also does not affect a substantial right. Further, if an order denying a motion to amend an answer is not immediately appealable, it stands to reason that an order arising even earlier in the procedural posture is also not appealable. *See Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 148 (2004) (dismissing an appeal from a motion to amend an answer because it is not immediately appealable). As this Court is keenly aware, a dismissal on this ground does not prevent Appellant from raising his arguments after a final judgment is entered. *Id.* at 230, 593 S.E.2d at 147 (noting the appellant would be able to appeal the decision at the conclusion of trial). Succinctly put, Appellant has not "arrived at the end of the road." *Id.* In fact, he has not even made it *to* the road. Accordingly, this Court should dismiss the appeal.

November 27, 2019

A handwritten signature in black ink, appearing to read "G. Scott Bellamy", is written above a horizontal line.

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IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM Horry COUNTY  
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Larry B. Hyman, Presiding Circuit Court Judge

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**CERTIFICATE OF SERVICE**


The undersigned, an employee of Hearn & Hearn, P.A. and over the age of eighteen (18) years, hereby certifies that (s)he served a copy of Respondent's Motion to Dismiss and Respondent's Memorandum in Support of the Motion to Dismiss by first-class mail, postage prepaid, deposited in the U.S. Mail and addressed to: Mr. Matthew H. Tyler, Aiken, Bridges, Elliott, Tyler & Saleeby, P.A., 181 E. Evans Street, Suite 409, Florence, SC 29506.

This 27<sup>th</sup> day of November, 2019.

HEARN & HEARN, P.A.

By: 

Sworn to before me this 27<sup>th</sup> day  
of November, 2019.

  
\_\_\_\_\_

Notary Public for S.C.

My commission expires: April 20, 2020

# Hearn & Hearn, P.A.

## *Attorneys at Law*

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November 26, 2019

TRANSMITTED VIA FACSIMILE (803-734-1839)  
AND FIRST-CLASS MAIL

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

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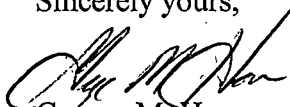
RE: Jesse Cooke v. Edward Jenerette  
Appellate Case No. 2019-001076

Dear Ms. Kitchings:

As Scott Bellamy informed you in his letter of November 18<sup>th</sup>, I have been associated to assist him with the above-referenced appeal. Enclosed for the Court's consideration are an original and six copies of Respondent's Motion to Dismiss and Respondent's Memorandum in Support of the Motion to Dismiss. Also enclosed is the original Certificate of Service by mail and our firm check in the amount of \$50.00.

I am providing opposing counsel with a copy of this transmittal and the underlying Motion.

Sincerely yours,



George M. Hearn

GMH/kk

Enclosures

cc: Mr. G. Scott Bellamy  
Mr. Matthew N. Tyler



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