THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Circuit Court
Marvin Dukes, Jr.
Master-in-Equity

Case No. 2011-CP-07-2216
Appellate Case No. 2012-213582

Helena P. Tirone and Truman's Eclectic Irish Pub, Inc. .....Respondents,

v.

Thomas W. Dailey ..... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

SOUTH CAROLINA RULES OF EVIDENCE

SOUTH CAROLINA RULES OF APPELLATE PROCEDURE

OTHER SOURCES

REPLY

The central issue before this Court is whether there exists a scintilla of evidence that supports piercing the corporate veil of Respondent Truman's Eclectic Irish Pub, Inc. and imposing personal liability on Respondent Helena Tirone. Strangely enough, in their brief the Respondents appear to agree that this evidence is present in the record. (Resp. Brief Sec. II.E). Instead of arguing there has been a failure of proof, the Respondents hide behind highly technical and specious arguments that elevate form over substance and prevent a trial on the merits of this case. The trial court must be reversed.

I. Respondents apply a Rule 12(b)(6) standard to their summary judgment motion while ignoring the scintilla of evidence that defeats it.

Throughout their brief, the Respondents repeatedly cite Appellant's alleged failure to plead facts supporting veil piercing in support of summary judgment.[1] This is incorrect; the function of summary judgment is to act as a gatekeeper for cases where there is insufficient proof from which the trier of fact can make a decision. When there exists a scintilla of evidence that supports a cause of action, this threshold is met and the action must proceed to the trier of fact.[2] The standard the Respondents advance is that of a Rule 12(b)(6), SCRCP, motion, where a complaint is dismissed, *without* prejudice and

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[1] "However, Dailey failed to include any facts to support veil piercing theories or allegations in his Answer and Counterclaim, First Amended Answer and Counterclaim, or Second Amended Answer and Counterclaims."(Resp. Brief Sec.I.A.). "Dailey failed to put Respondents on notice, through his Second Amended Answer and Counterclaims, that he was going to make a veil-piercing argument." (Resp. Brief Sec.III.). "...the trial court's order did not turn on a lack of evidence, but a defect in Dailey's pleadings." (Resp. Brief Sec.IV)

with leave to amend, if the facts do not set forth a cause of action. Rule 12(b)(6), SCRCP; Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006).

In their first argument, the Respondents do not ask this Court to perform the customary threshold analysis of summary judgment. This is undoubtedly because they have effectively conceded that a scintilla of evidence supporting veil piercing exists in the record; they merely object to the timing of when it was introduced: in discovery prior to her deposition or at her deposition. Of the eight factors of the Sturkie test for piercing the corporate veil (Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316 (Ct.App.1984)), the respondents admit to the following **six** in the second argument to their brief (Respondent's Initial Brief Argument II. E):

(2) failure to observe corporate formalities;

"In response to Dailey's First Request for Production 6, Respondents stated that there were no bylaws." (Respondent's Initial Brief Argument II. E)

(4) insolvency of the debtor corporation at the time;

"Regarding the corporation having no assets, Respondents provided this information in response to Dailey's Second Request for Production 3 and provided banking records in response to Dailey's First Request for Production 13." (Respondent's Initial Brief Argument II. E)

(5) siphoning of funds of the corporation by the dominant stockholder;

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[2] The fact that Appellant did not explicitly request this relief is not material, as it is well-settled that in South Carolina, a court is not limited to the pleadings in the relief it may grant. McMaster v. Strickland, 322 S.C. 451, 472 S.E.2d 623 (1996).

"As to the removal of assets of Respondent Truman's Eclectic Irish Pub, Inc., Respondents stated in response to Dailey's Second Set of Interrogatory 2 that 'everything was removed from [the pub] to various locations including [Tirone's home] and a storage unit.'"(Respondent's Initial Brief Argument II. E)

(6) non-functioning of other officers or directors;

" In their Answer to Dailey's Interrogatory 9, Respondents stated that Tirone was the only officer. "(Respondent's Initial Brief Argument II. E)

(7) absence of corporate records; and

"As to corporate records, Respondents provided the records in their possession in response to Dailey's First Request for Production 4 and 8 and confirmed that there were no minutes or resolutions in response to Dailey's Firs Request for Production 7 and Dailey's Second Request for Production 5 and 6. These responses were provided to Dailey on or about October 14, 2011." (Respondent's Initial Brief Argument II. E)

(8) the fact that the corporation was merely a facade for the operations of the dominant stockholder.

"For example, regarding Tirone as the sole owner of the corporation, Respondents stated that Tirone was the sole shareholder of Truman's Eclectic Irish Pub, Inc. in response to Dailey's Interrogatory 8." (Respondent's Initial Brief Argument II. E)

One of the other two factors that was not directly addressed by the Respondents was addressed during Respondent Tirone's deposition:

(1) whether the corporation was grossly undercapitalized;

"The Plaintiff acknowledged that outside of her signed loan agreement to the corporation, she did not disburse the amount of the agreement on the date signed but instead:

> Q: Did you put in $125,000 at the start or incrementally?
> A: Incrementally.
> Q: How did that work? He would just call you and say that he needed more money in the account?
> A: No, I put the first $50,000 in. I guess he would tell me things are running low or something like that, I guess.

(Tirone Depo. 53: 4-11). The original loan disbursement was not made in full, neither by her testimony nor in documentation provided during discovery." (Appellant's Initial Brief, Argument 1)

The existence of arguably contradictory evidence in the record is entirely irrelevant to summary judgment analysis. "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 329-30, 330, 673 S.E.2d 801, 802 (2009).

Thus, by the admission of the respondents in their brief, six of the eight factors occurred prior to the deposition and were evident in the record (which, if it were so obvious prior to deposition as the respondents claim, one would think evidence would

constitute notice that veil piercing will be sought). However, in spite of the admissions of six Sturkie factors made by Respondents, they did not include one, which was discovered at the Respondent's deposition as shown above, thereby showing that there was, in fact, **new** evidence discovered at the deposition, since the respondents did not feel they could admit that the information was found in prior discovery as they had for all the other factors. This therefore casts their contention that "the deposition of Tirone was cumulative and thus could not be considered newly discovered evidence" in a bizarrely contradictory and dubious light.[3]

Lastly, the respondent twice cites Woodside v. Woodside. Woodside can be distinguished because a) an non-analogous match as it is a family law case and b) because the issue was not the wife's status or non-status as a 3rd party that prevented the piercing of the corporate veil, but the lack of perceived benefit to the "dominant" shareholder/husband ("We have reviewed the record and are unable to find a sufficient basis for disregarding the corporate structure and constructively allocating its income to the husband."). Tirone's deposition and claim that she was the only shareholder thus make Dailey a 3rd party and eligible by Sturkie to pierce the corporate veil. All the assets and income have been possessed by Tirone as she has admitted in her respondents brief and in her deposition testimony.

[3] Appellant would note that Respondents assertion that this evidence was available via their responses to discovery in 2011 appears to contradict the affidavit of their counsel, who claims that no discovery on veil piercing had taken place. (Resp. Brief Sec.V; Aff. of Twombley).

II. Tirone's testimony, obtained as soon as possible in light of Respondents' discovery abuse, would have changed the outcome of the summary judgment motion hearing.

In advancing their argument that Appellant's Rule 60(b), SCRCP, was properly denied, the Respondents cite Spreeuw v. Barker, 385 S.C. 45, 682 S.E.2d 843 (Ct. App. 2009). In Spreeuw ,the movant had filed a Rule 60(b) motion post-trial to be relieved from a child support order. This is not analogous to the case at bar. However, even using the standard proposed by the Respondents, it is clear that Appellant was entitled to relief.

Likelihood of changed result

To change the outcome of a child support action, the newly-discovered evidence would have to be likely change the "preponderance of the evidence". Here, the newly-discovered evidence need only change what is arguably the lowest evidentiary standard in South Carolina jurisprudence: a "scintilla of evidence". The ease of finding a scintilla of evidence[4] cannot be overemphasized: the South Carolina Supreme Court has defined a "scintilla" as "'a gleam,' 'a glimmer,' 'a spark,' 'the least particle,' 'the smallest trace.'" *Beathea v. Floyd*, 177 S.C. 521, 181 S.E. 721, 724 (1935).

[4] Judge Tommy Kemmerlin, the late Master-in-Equity for Beaufort County, has also noted the ease by which a summary judgment motion may be denied: "The sum total of eleven years of being reversed on almost every summary judgment motion appealed...convinces me that the Appellate Courts of this State view it appropriate to grant summary judgment only where a claim or defense is patently absurd..." Scott Moïse, *Drafting Summary Judgment Motions: "What part of scintilla don't you understand?" (Part 1: The Motion)*, South Carolina Lawyer (May 2013) at 54. It is worthwhile to note that Judge Kemmerlin was referencing South Carolina's prior, more stringent, "genuine issue of material fact" standard.

As set forth in part I, the Respondents have effectively conceded that a scintilla of evidence has existed in the record since 2011. Respondents' allegation that such evidence is "cumulative" is incorrect: "Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point." State v. Funderburke, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968). In a case involving a new trial motion, using a standard very similar to that presented by the Respondents, our Supreme Court held:

> Cumulative evidence has been tersely defined as additional evidence of the same kind to the same point. It is apparent that there is a wide difference in meaning between the terms 'of the same kind' and 'to the same point', as used in the various definitions. Newly discovered evidence, to be cumulative, must not only tend to prove facts which were in evidence at the trial, but must be of the same kind of evidence as that produced at the trial to prove those facts. If it is of a different kind, though upon the same issue, or of the same kind on a different issue, it is not cumulative. Nor is evidence cumulative in the legal sense which, while tending to establish the same general result, does it by proof of a new and distinct fact. To render evidence subject to the objection that it is cumulative, in the legal sense, it must be cumulative, not with respect to the main issue between the parties, but on some collateral or subordinate fact bearing on that issue. * * * Newly discovered evidence raising a new ground of claim or defense is, of course, not cumulative, nor is evidence explaining an apparent conflict in or contradicting, evidence offered at the trial. Newly discovered evidence of admissions has been held not to be cumulative to evidence of facts and circumstances.

McCabe v. Sloan, 184 S.C. 158, 191 S.E. 905, 909 (1937).

Tirone's testimony from her deposition is not cumulative of her responses to discovery. First, unsworn discovery responses (as were provided by the Respondents) are not of the same "kind" as oral testimony under oath and subject to cross-examination.[5] Further, documentary evidence (the various documents produced during requests for

production) is not of the same "kind" as oral testimony. Finally, the statements made by Tirone during her deposition constitute admissions, and are thus not considered cumulative. See Rule 801(d)(2), SCRE; McCabe, *supra*.

As the owner and sole officer of Truman's, Tirone was in the best position to testify as to its operations, and her testimony satisfied nearly every element of the Sturkie test. Had this testimony been before a court, and had the court allowed all inferences for the non-moving party (here, the Appellant), it is abundantly clear that a scintilla of evidence existed in support of veil piercing.

III. The Respondents' cited case law and the facts in the record support continuance of the summary judgment hearing or denial of their motion.

It is clear that South Carolina courts may continue a summary judgment hearing[6], either with or without an affidavit of counsel, pursuant to Rule 56(f), SCRCP. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). The Respondents admit as much in their citation of Baughman. The Respondents appear to argue that Appellant has not met mitigating factors laid out in Baughman. (Resp. Brief Sec.IV.) . The specific list of mitigating factors laid out in Baughman were not a test, ala Sturkie, that other cases would have to meet, but, rather Baughman stands for the proposition that mitigating factors, in general, are what is required.

Respondents contention that mitigating factors are missing in the case at bar are simply and utterly incorrect by any reasonable view. The new evidence was discovered

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[5] Additionally, arguing that Tirone's testimony is cumulative of this evidence effectively admits that it is relevant to a veil piercing analysis.

during deposition three days prior, on a Friday, and the hearing was on a Monday, literally the first available day that the issue could be raised. The appellants properly made a motion, which respondents apparently do not understand in Rule 7(b)(1) that a written motion is not necessary if the motion for an order is made "*during a hearing or trial in open court with a court reporter present*". Rule 7(b)(1), SCRCP Appellant properly made his motion to continue the summary judgment hearing in open court, before a court reporter. Rule 7(b)(1), SCRCP; (Sum. Jud. Hrg. Tr. p. 9 line19-p.10, line3). The respondents, in their brief, acknowledge this and point to the hearing transcript to show that the verbal motion was made[7]. (Resp. Init. Brief Sec 4).

The respondents further make false contentions that "Dailey had more than one year, in which he could have taken Tirone's deposition." As the record shows, on June 20th, the respondent filed a protective order to prevent Tirone's deposition until the date on which it was ultimately taken (July 27th) and then filed the Motion for Summary Judgment the next day, June 21st. For the respondent to complain that the appellant had more than enough time, when the respondent is the one who created and forced such a collapsed time frame is disingenuous at best and egregious motions abuse at worst.

IV. Appellant's motion(s) to amend were made in accordance with the rules and should have been granted.

Respondent cannot complain of lack of notice for any motion to amend. Notice of a motion to add veil-peircing allegations was made multiple times, in writing, to the

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[6] Respondents' citation of State v. McKennedy, 348 S.C.270,280 is inapposite, as it refers to a continuance of trial, and not a continuance under Rule 56(f), SCRCP.

Respondents' attorney. (Defendant's Memorandum of Law for July 30, 2012 Motions Hearing; Motion for Reconsideration). The Respondents admit as much: "In footnote 1 to his Motion to Reconsider, Dailey states that '[t]o the extent a motion to amend the counterclaim is necessary, Defendant makes such a motion.'" (Resp. Init. Brief Sec. V). Furthermore, "An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing...The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion." Rule 7(b)(1), SCRCP. Appellant's motion to amend was made orally in open court in the presence of a court reporter at the Motion for Summary Judgment hearing. (Sum. Jud. Hrg. Tr. p. 9 line19-p.10, line3).

V. Respondents have made an incorrect allegation regarding the totality of the transcript for the Motion for Summary Judgment Hearing

In footnote four of their brief, the Respondents allege that Appellant did not order the entire transcript of the July 30, 2012, hearing, in violation of Rule 207, SCRAP. This is incorrect. Counsel for the Appellant ordered the entire transcript from the court 'reporter on December 11, 2012. Apparently, as was contended during the Appellants Initial Brief, due to the large amount of off-the-record conferences, the transcript for this roughly hour-long hearing (started at approximately 9:15am and concluded at 10:23am) totaled eleven pages.

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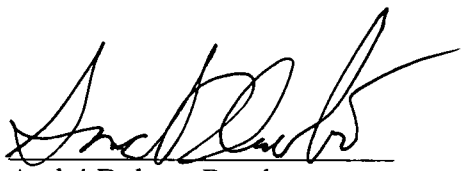
[7] "In the Memorandum of Law, which was filed on the same day as the hearing, *and at the hearing* (emphasis added), Dailey asked for a continuance so that the transcript of Tirone's transcript could be presented."

CONCLUSION

Instead of seeking to have this case tried on its merits, the Respondents seek to conceal the true issues in this case behind their hyper-technical interpretations of the rules. This is neither the law nor the policy of South Carolina. E.g. Rule 1, SCRCP ("[The SCRCP] shall be construed to secure the just, speedy, and inexpensive determination of every action."). It is painfully clear that the record contains a scintilla of evidence to support piercing the corporate veil, and the Respondents effectively admit this. Appellant asks this Court to reverse the court below and allow this case to proceed to a full, final, and single trial on the merits of all claims.



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PROOF OF SERVICE

I, André Rembert, attorney for the Appellant, certify that I have served opposing counsel in this action by serving a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by U.S. Mail to the following on the date listed below:

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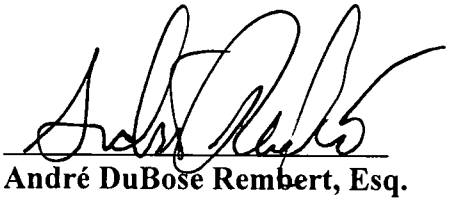

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