THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge for Beaufort County

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Case No.: 2011-CP-07-02216
Appellate Case No.: 2012-213582

HELENA P. TIRONE AND TRUMAN'S ECLECTIC IRISH PUB, INC..... Respondents,

-vs.-

THOMAS W. DAILEY..... Appellant.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF THE CASE

Respondents, Truman's Eclectic Irish Pub, Inc. and Helena P. Tirone (Tirone), filed a Summons and Complaint against Appellant, Thomas Dailey (Dailey), on May 20, 2011. (R. pp. 21-25). Dailey filed an Answer and Counterclaim on June 3, 2011. (R. pp. 192-196). Dailey amended his Answer and Counterclaim two times, first on December 5, 2011, and again on June 21, 2012. (R. pp. 197-202 and R. pp. 203-213).[1]

On June 25, 2012, Tirone filed a Motion for Summary Judgment. (R. pp. 213(a)-214)[2]. A hearing was held on July 30, 2012. (R. pp. 339-342) On August 10, 2012, the Circuit Court granted Tirone's Motion for Summary Judgment. (R. pp. 11-17). On September 13, 2012, Dailey filed a motion styled as a "Motion to Reconsider;" however, the motion was made pursuant to Rule 60(b)(2), SCRCP. (R. pp. 324-338). The Motion

[1] Dailey was first represented by Larry Wayne Weidner, Esquire of Beaufort. Dailey was then represented by Jim Moss, Esquire, and then Fred Kuhn, Esquire, both of Beaufort. For a brief period of time, Dailey represented himself pro se. Dailey is now represented by André Rembert, Esquire of Charleston.

[2] The Record on Appeal has duplicate page numbers 213, so Respondent is referencing the duplicate page as 213(a).

to Reconsider was denied by the Circuit Court on December 7, 2012. (R. pp. 18-19). Dailey filed a Notice of Appeal on December 7, 2012.

FACTS

Tirone and Dailey were involved in a romantic relationship. During the relationship, Dailey represented to Tirone that he was a fiscally responsible person, that he possessed business acumen, and that he was otherwise capable and able to oversee the opening of a restaurant/bar in Beaufort, South Carolina. (R. p. 378, lines 2-15). Based on these representations, Tirone agreed to enter into a business venture with Dailey to open an Irish themed pub and formed a corporation, Respondent Truman's Eclectic Irish Pub, Inc. (Pub). (R. pp. 252-253).

Dailey testified that he was responsible for essentially all aspects of the formation and organization of the Pub including what type of corporation would be formed (R. pp. 347-348), how the corporation would be formed (R. p. 346, line 22), where the business would be located (R. p. 348, lines 19-25), the type of business the corporation would engage in (R. p. 349, lines 1-5), and what type of insurance the business would need (R. p. 351, lines 1-13).

As preparations to open the Pub were underway, the romantic relationship began to fracture, which caused Respondents to closely examine the day to day operations of the business, including its bank accounts. The examination was not favorable to Dailey. (R. p. 398, lines 3-16; p. 401, lines 3-7; p. 419, line 24-p.420, line 13).

When Respondents began to query Dailey as to various business issues, Dailey became upset, decided that he needed "some type of protection," and determined that the only type of protection he could get was in the form of an employment contract. (R. p.

364, lines 6-16). Dailey drafted two Key Employee Employment Contracts and admits that the contracts had terms very favorable to him. (R. p. 358, line 17-p. 359, line 25; p. 367, lines 10-12). These very favorable terms included that the Pub (1) was required to or "shall" hire Dailey; (2) that once hired, Dailey would have "complete oversight, management and operational control" of the Pub including "hiring and firing" and "any other duties"; (3) that Dailey could not be terminated for any reason whatsoever; (4) that Dailey would be paid a salary for four (4) years irrespective of the success of the business; and (5) that if he were terminated, Dailey would receive a lump sum payment of his salary for the remaining term of the contract (up to $260,000.00) plus 50% of the stock of the corporation. (R. pp. 83-88; pp. 254-257; p. 368, line 25-p. 369, line 21). Dailey testified that even if he did something improper and deserved to be fired, he would still be entitled to "a quarter of a million dollars and half ownership interest in the company." (R. p. 368, lines 5-10). Dailey further testified that these terms were fair, despite the fact that Tirone has committed 100% of the capital to the corporation, and he had not contributed any. (R. p. 218; pp. 294-296; p. 310; p. 350, lines 5-17).

Through duress, threats and coercion, Dailey forced Tirone, acting on behalf of Respondent Truman's Eclectic Irish Pub, to sign the two Key Employee Employment Contracts. (R. pp. 22-25; pp. 26-40; pp. 41-191; p. 403, lines 4-14; p. 416, line 18-p. 418, line 1). The threats included a threat to contact Tirone's long time employer, the Fluor Daniels Corporation, and provide it with false information that would allegedly result in Tirone's termination. (R. p. 403, line 3-p. 404, line 1). As Dailey testified in his deposition, "I said I would embarrass her if she continues to embarrass me." (R. p. 387, lines 12-14; p. 388, lines 11-12).

During their review of the day to day operations of the business, Respondents discovered that Dailey was stealing money from Respondent Truman's Eclectic Irish Pub. (R. pp. 22-25; pp. 26-40; pp. 41-191; pp. 399, line 4-p.400, lines 1-15; p. 402, lines 4-6; p. 419, line 15-p. 420, line 10). For example, Dailey testified in his deposition that he would write a check from the business account of Respondent Truman's Eclectic Irish Pub, have a third party cash the check and then use the cash to pay Dailey's child support obligations. (R. p. 375, line 13-p. 376, line 2; p. 376, lines 12-p.377, line 6; p. 379, lines 1-17; pp. 442-443). As another example, Beverly Stanveck testified that Dailey tried to sell Pub equipment to her for cash. (R. pp. 441-442).

Tirone also became concerned because Dailey's representation about being a fiscally responsible person and possessing business acumen were turning out not to be true. For example, Respondents later discovered that: a) Dailey has a historical delinquency in making child support payments, and at the time he made the representation of fiscal responsibility, was over $4,000 in arrears in his child support obligations; b) Dailey had defaulted on three separate mortgage loans and had $871,152.29 worth of judgments against him; c) Dailey had defaulted on five other loan agreements with Central Star Credit Union and owes over $48,000.00 to Central Star Credit Union who had initiated five collections actions against him; d) Dailey has various creditors related to unpaid credit card accounts and unpaid cellular telephone accounts who are currently looking for him; e) Dailey had not filed a 2008, 2009 or 2010 personal tax return and his solely owned EBJ corporation had never filed a tax return; f) Dailey has previously filed Chapter 13 Bankruptcy, defaulted on his agreed upon plan to pay back his creditors, and then filed Chapter 7 Bankruptcy; and g) Dailey has been involved

in other civil lawsuits in which he was sued for personal fiscal issues. (R. pp. 50-51; p. 384, line 24-p. 285, line 4 (Deutsche Bank); p. 346, lines 9-12 (EBJ tax returns); p. 373, lines 12-16 (personal tax returns); p. 374, lines 18-24 (child support); p. 380, lines 1-15 (bankruptcy); p. 383, line 6-p. 386, line 13 (child support, MCAS, Deutsche Bank, Central Star); p. 389, lines 13-24 (bankruptcy); p. 390, line 25-p. 391, line 20 (bankruptcy); p.393, line 11-p.394, line 6 (other lawsuits and creditors calling)).

Respondent Truman's Eclectic Irish Pub, Inc., decided that it would be best for the parties to enter a cooling off period and informed Dailey that the locks to the building the business was leasing were being changed so that the parties could maintain the status quo while they discussed the path ahead for the Pub. (R. p. 370, line 19-p. 371, line 20). At that point in time, Dailey had been informed about locks being changed and the cooling off period, and Dailey did not have a key to the Pub building.

Thereafter, unbeknownst to Respondents, Dailey hired a locksmith, surreptitiously gained access to the Pub by telling the locksmith that he was a part owner in the building, and had the locks rekeyed such that he now held the only key. (R. 381, lines 7-21). When Respondents later discovered that someone was inside the building, the police were called, Dailey was ultimately removed from the building, and a temporary restraining order (TRO) was entered restraining Dailey from entering the building. (R. pp. 1-2).

On July 30, 2011, the original TRO was converted into an injunction and Dailey was enjoined from entering the building until further order of the court. (R. p. 7). Significantly, Dailey was also enjoined from contacting Tirone's employer for purposing of disparaging her. Id.

On October 13, 2011, the original injunction was expanded after Dailey came to the building in violation of the court's prior injunction order. (R. p. 9). In addition, a new injunction was entered after Dailey sent harassing text messages to Tirone saying the police were looking for her and threated to publish photos of Tirone in her underwear over the internet. (R. p. 10; pp. 387-388).

ARGUMENT

I. The Circuit Court correctly granted Respondent Helena Tirone's Motion for Summary Judgment

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." Melton v. Medtronic, Inc., 389 S.C. 641, 650, 698 S.E.2d 886, 891 (Ct. App. 2010). Under Rule 56(c), SCRCP, summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In the instant case, the Circuit Court properly granted summary judgment to Respondent Helena Tirone.

A. *Individual liability of Tirone under veil piercing*

Dailey first argues that Tirone faces liability based on a veil piercing argument. 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. Accordingly, the trial court properly granted Tirone summary judgment in her individual capacity regarding a veil piercing claim.

Rule 8(a), SCRCP, requires that all pleadings that set forth a cause of action or counterclaim must contain "(1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of **the facts** showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for **the relief to which he deems himself entitled**." Rule 8(a), SCRCP (emphasis added). Therefore, Dailey was required to give Tirone notice of "the facts" showing he is entitled to relief and notice of "the relief to which he deems himself entitled." Watts v. Metro Security Agency, 346 S.C. 235, 550 S.E.2d 869 (Ct. App. 2001).

Further, the claims made in the pleadings establish the issues for litigation. For example, the scope of discovery is limited to subject matter relevant to the subject matter of the pending action. Rule 26(b), SCRCP. Moreover, it is "well settled" that parties are judicially bound by their pleadings. Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App.1992). Finally, a party "who has pled one theory should not be allowed to recover upon another." Blackburn and Co., Inc. v. Dudley, 289 S.C. 415, 417, 338 S.E.2d 151, 154 (1985).

Seeking to pierce the corporate veil is not a cause of action in and of itself but is a theory of liability. Drury Dev. Corp. v. Foundation Ins. Co., 380 S.C. 97, 102, 668 S.E.2d 798, 801 (2008). However, the party seeking to pierce the corporate veil must still provide notice of its theory of liability to the opposing party in the pleadings. Id. at 102, 668 S.E.2d at 802; Rule 8(a), SCRCP. "[S]o long as the plaintiff has pled facts sufficient to survive a motion to dismiss as to the corporate liability claims and the alter ego claim,

the trial court should move forward to determination of both matters." Id. at 102, 668 S.E.2d at 802.

A review of Dailey's Second Amended Answer and Counterclaim establishes that there are no allegations that would put Tirone and Respondent Truman's Eclectic Irish Pub, Inc. on notice that Dailey was seeking to pierce the corporate veil. There are no allegations that the corporation was grossly undercapitalized. There are no allegations that there was a failure to observe corporate formalities. There are no allegations relating to non-payment of dividends. There are no allegations that Tirone siphoned off funds. There are no allegations of non-functioning officers. There are no allegations relating to the lack of corporate records. There are no allegations that Respondent Truman's Eclectic Irish Pub, Inc. was a façade for Tirone. There are no allegations that injustice or fundamental unfairness will result if the corporate veil is not pierced. The prayer for relief does not request that the corporate veil be pierced, or that Tirone be held individually responsible for the debts of the corporations. See generally Multimedia Publ'g of S.C., Inc., v. Mullins, 314 S.C. 551, 431 S.E.2d 569 (1993) (requiring that there be injustice or fundamental unfairness if the corporate veil is not pierced and listing factors to be considered when seeking to pierce the corporate veil); Dumas v. InfoSafe Corp., 320 S.C. 188; 463 S.C.2d 641 (Ct. App. 1995) (listing factors to be considered when seeking to pierce the corporate veil); Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984) (same). (R. pp. 203-213).

Fundamental unfairness is typically shown when a shareholder financially benefits from the corporate form by receiving a corporation's profits or other money through a proper or improper shareholder distribution, while the creditor is left to enforce

his claim against an insolvent corporation. See, e.g, Sturkie, 280 S.C. at 453, 313 S.E.2d at 316. Here, Tirone has not received any financial benefit from the corporation whatsoever because the Pub never opened and never produced any revenue. (R. pp. 69-81; p. 219; p. 357, lines 10-11; p. 434, ¶ 33). To the contrary, she has lost over One Hundred Thousand ($100,000.00) Dollars, and counting. On the other hand, Dailey has not lost financially in the corporation, and in fact has had his child support obligations paid for with the corporation's money. Dailey cannot claim that the loss of his sweat equity constitutes a financial loss because he was on unemployment during the entire time his sweat equity was allegedly provided. (R. 344, lines 20-25; p.372 lines 12-17; p. 426, ¶ 14). Moreover, Dailey is the reason that the corporation is insolvent. Aside from the fact that he was responsible for the management of the corporation, he misappropriated the corporation's funds. (R. pp. 22-25; pp. 26-40; pp. 41-191; p. 375, line 13-p. 376, line 2; p. 376, line 12-p. 377, line 6; p. 399, line 4-p. 400, line 15; p. 402, lines 4-6; p.419, line 15-p.420, line 10;). This is simply not the type of case where Dailey could possibly show that recognizing the corporate form would result in injustice or fundamental unfairness to Dailey.

Finally, it would be legally impermissible to disregard the corporate veil here because the corporate form may only be disregarded to assist a third party. Woodside v. Woodside, 290 S.C. 366, 370, 350 S.E.2d 407, 410 (Ct.App.1986) ("The corporate form may be disregarded only where equity requires the action to assist a third party.") (emphasis added); Sturkie, 280 S.C. at 458, 313 S.E.2d at 319 ("The corporate form may be disregarded only where equity requires the action to assist a third party.") (emphasis added). Here, Dailey alleges that he and Tirone were "partners in a joint venture" and

were "equal partners." (R. p. 218; pp. 221-222). Dailey also testified in his deposition that "in my eyes I was a partner." (R. p. 365, lines 9-12). Therefore, a veil piercing claim would have failed as a matter of law, had it been properly asserted.

Since Dailey's Second Amended Complaint and Counterclaims did not contain any allegations to put Respondents on notice that Dailey would raise the theory of piercing the corporate veil, since Dailey cannot show fundamental unfairness, and since Dailey is by his own allegations is not a third-party to the corporation, the Circuit Court properly granted Tirone summary judgment in her individual capacity.

B. *Individual liability of Tirone under employment contracts.*

Dailey asserts in the title of Argument I that "the record contains substantial evidence that Helena Tirone is a proper defendant, both individually and after piercing the corporate veil," suggesting that the Circuit Court improperly granted Tirone summary judgment as to her individual liability under two Key Employee Employment Contracts. However, Dailey fails to provide any argument to support the assertion. Therefore, Dailey has waived any argument related to Tirone's individual liability under the employment contracts. See Rule 208(b)(1)(D), SCACR (requiring argument of each issue in an appellant's brief to include discussion of the issue as well as citations to authority); Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54 n.4,677 S.E.2d 32,36 n.4 (Ct. App. 2009) (deeming an issue waived on appeal if it is not argued in the appellant's brief). Nevertheless, even if Dailey has not waived such an argument, the argument has no merit.

A review of the Key Employee Employment Contracts establishes that the contracts were entered into between "Truman's Eclectic Irish Pub, Inc.," and "Thomas

W. Dailey." (R. pp. 83-88; pp. 254-257). The contracts specify that Respondent, Truman's Eclectic Irish Pub, Inc., is the Employer. (R. pp. 83-88; pp. 254-257). Tirone signed the contracts as the "Owner, President & CEO, Truman's Eclectic Irish Pub, Inc." (R. pp. 83-88; pp. 254-257). Further, Dailey conceded and confirmed that the Key Employee Employment Agreements were between him and Respondent Truman's Eclectic Irish Pub, Inc.: "Q: Would you agree with me, Mr. Dailey, that both of these agreements as stated in paragraph 1 of both agreements are between Truman's Eclectic Irish Pub, Inc., employer, and Thomas W. Dailey, employee? A: Yes." (R. p. 366, lines 15-20).

A review of the Key Employee Employment Contracts and the testimony of Dailey establishes that the contracts were between Dailey and Respondent Truman's Eclectic Irish Pub, Inc., only. Accordingly, the Circuit Court did not err in granting summary judgment to Tirone.[3]

II. The Circuit Court properly denied Dailey's Rule 60(b) Motion since there is no newly discovered evidence.

The decision to grant or deny a motion made under Rule 60, SCRCP, lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Accordingly, an appellate court's standard of review is limited to determining whether the trial court abused its discretion. An abuse of discretion occurs only where the trial court's order is controlled by an error of law or where the order is

[3] While the Key Employee Employment Contracts unambiguously establish that the parties to the contracts are Dailey and Respondent Truman's Eclectic Irish Pub, Inc., if there is any ambiguity, it must be construed against Dailey. Dailey testified in his deposition that he downloaded and modified the Key Employee Employment Contracts. The modifications included inserting information into the contract form. Dailey stated that no other person made any changes to the Key Employee Employment Contracts. (R. p. 358, line 17-p. 359, line 25). Accordingly, any ambiguities would be construed against Dailey, the drafter of the contracts. See, e.g., Duncan v. Little, 384 S.C. 420, 682 S.E.2d 788 (2009) (holding that ambiguities in a contract are construed against the drafting party); Williams v. Teran, Inc., 266 S.C. 55, 221 S.E.2d 526 (1976) (same).

based on factual conclusions that are without any evidentiary support. See McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 563 (Ct. App. 2008).

To obtain relief from a judgment based on newly discovered evidence, the moving party must establish that the newly discovered evidence: "(1) is of such magnitude that had the court known of it earlier, the outcome would likely have been different; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; **and** (5) is not merely cumulative or impeaching." Spreeuw v. Barker, 385 S.C. 45, 62-63, 682 S.E.2d 843, 852 (Ct. App. 2009) (emphasis added). Dailey failed to show that he could meet any element, much less all of the elements.

A. The purported newly discovered evidence was not of the magnitude to change the outcome

First, Dailey failed to show that Tirone's deposition transcript was "of such magnitude that had the court known of it earlier, the outcome would likely have been different." Spreeuw, 385 S.C. at 62-63, 682 S.E.2d at 852. Dailey's deposition testimony conclusively shows that he has no evidence to support a veil piercing claim. For example, with respect the capitalization of the corporation, Dailey testified that "Tirone contributed a sufficient amount of money to conduct the business of [the corporation]." (R. p. 350, lines 22-25). While Dailey argues on appeal that the corporation did not have functioning officers and directors, he testified under oath that the corporation had "functioning officers and directors" (R. p. 355, lines 4-6). While Dailey argues on appeal that there were no corporate records and that the corporation never had meetings, Dailey testified during his deposition that there were "corporate records," that he attended "the Corporation's first Board Meeting," and "minutes were

taken of meetings." (R. p. 355, lines 7-10; pp. 429, ¶ 20). Dailey agreed during his deposition that he believed all of the corporate formalities as far as "having meetings, having a separate checking account, going to talk with an accountant, all of the things that needed to be done to have a real functioning corporation were done" or were on their way to being done. (R. p. 352, lines 18-24; p.353, line 22-p. 354, line 6). Dailey testified that he did not have any evidence that Tirone misappropriated money from the corporation. (R. p. 355, lines 16-19). Dailey testified that he did not have any evidence that Tirone inappropriately "siphoned away, embezzled, or mismanaged money of the corporation for her own personal interest." (R. p. 356, lines 6-10). Dailey agreed that he was not taking the position in the litigation that "this corporation was merely a façade for Helena Tirone" and agreed that it was "an actual functioning corporation." (R. p. 356, lines 11-15). "It is a general rule that a party is concluded by his own testimony which is favorable to the adverse party." Lytle v. Reagan, 256 S.C. 269, 273, 182 S.E.2d 302, 304 (1971). Therefore, nothing in Tirone's deposition would have changed the ultimate outcome.

B. The purported newly discovered evidence was not "discovered" since the hearing

The deposition testimony of a party opponent is not the type of evidence that can serve as "newly discovered evidence" under Rule 60(b). Dailey knew or should have known that he could depose Tirone and use her deposition to properly prosecute his counterclaims. It simply does not pass muster to argue that Tirone's deposition transcript was "newly discovered evidence."

C. The purported newly discovered evidence could have been discovered before the hearing

Even if the deposition transcript of a party can be considered "newly discovered" evidence as contemplated by Rule 60(b), the deposition transcript for Tirone could have been discovered before the summary judgment hearing and was in fact known before the summary judgment hearing. Newly discovered evidence is evidence "which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Southeastern Housing Foundation v. Smith, 380 S.C. 621, 636-37,670 S.E.2d 680, 688 (Ct. App. 2008). Pursuant to Rule 30(a)(1), SCRCP, Dailey had the ability to notice the deposition of Tirone after the instant lawsuit was filed on May 20, 2011, more than a year prior to Tirone moving for summary judgment.

D. Material to the issue

The deposition transcript of Tirone is not material to the issues as it does not support a veil piercing argument and is otherwise cumulative as set forth below.

E. The purported newly discovered evidence is merely cumulative

The excerpts of the deposition of Tirone contained in Dailey's Motion to Reconsider are cumulative to the other evidence in the case. Dailey cites Tirone's deposition to establish the amount of money she paid into the Respondent Truman's Eclectic Irish Pub, Inc. (R. p. 327). However, the corporation's bank records were provided to Dailey on or about October 14, 2011, in response to Dailey's First Request for Production 13. (R. p. 292). Further, the answer to Dailey's Interrogatory 11, provided to Dailey on or about October 14, 2011, lists the money paid by Respondent Helena Tirone. (R. p. 310).

Dailey also cites Tirone's deposition to support contentions that there were no financial statements prepared, no cash flow model, no officers elected, no bylaws, and no corporate records. (R. pp. 328-330). However, the information regarding financial statements and cash flow model was provided to Dailey by Respondents' response to Dailey's First Request for Production 13 (banking statement provided) and by Respondents' response to Dailey's Interrogatory 1 (listing Martin Craft and Jatin Patel as witnesses with information about financial information) and Interrogatory 11 (stating money deposits made by Respondent Helena Tirone into Respondent Truman's Eclectic Irish Pub, Inc.). (R. pp. 287-293; pp. 297-311). Highlighted bank statements were also provided to Dailey on May 7, 2012. (R. pp. 221-222; 276-277). In their Answer to Dailey's Interrogatory 9, Respondents stated that Tirone was the only officer. (R. p. 310). In response to Dailey's First Request for Production 6, Respondents stated that there were no bylaws. (R. p. 291). 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 First Request for Production 7 and Dailey's Second Request for Production 5 and 6. (R. pp. 280-286; pp. 287-293). These responses were provided to Dailey on or about October 14, 2011. (R. pp. 280-286; pp. 287-293).

In his Motion to Reconsider, Dailey cites Tirone's deposition testimony to support contentions that she was the sole owner of Respondent Truman's Eclectic Irish Pub, Inc., and that she improperly disposed of the assets of Respondent Truman's Eclectic Irish Pub, Inc. (R. pp. 330-332). These citations do not establish that Tirone improperly disposed of any assets and, nevertheless, are again cumulative to the other evidence in the

case. For example, regarding Tirone as the sole owner of the corporation, Respondents stated that Tirone was the sole shareholder of Respondent Truman's Eclectic Irish Pub, Inc. in response to Dailey's Interrogatory 8. (R. pp. 309-310). As to the removal 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." (R. p. 447). 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. (R. pp. 280-286; pp. 287-293). Moreover, the very arguments advanced by Dailey in Section III of his Brief establishes that the deposition of Tirone was cumulative and thus could not be considered newly discovered evidence. App. Brief pp.23-24.[4]

Dailey complains that the Circuit Court did not address the issues raised in his Rule 60, SCRCP, Motion relating to whether supplemental proceedings could be taken against one of the Respondents. However, Dailey failed to make a motion pursuant to Rule 59(e), SCRCP, to obtain a ruling on the issue either after the Circuit Court filed its Order dated August 10, 2012, or after the Form 4 Order disposing of the Rule 60, SCRCP Motion. Dailey could and should have timely made such motions **irrespective of any argument related to newly discovered evidence**. Accordingly, this issue is not

[4] The trial court's summary judgment order did not turn on Dailey's failure to produce evidence that has now been discovered. The trial court found that "Dailey has filed three (3) separate counterclaim pleadings over the course of twelve (12) months: June 3, 2011; December 5, 2011 and June 21, 2012. Dailey has never alleged any facts to support a veil piercing theory or even requested that the corporate veil be pierced. Based on the above, Plaintiffs' Motion for Summary Judgment as to the individual liability of Tirone is hereby granted." (R. p. 13). There was ample support for the trial court order. As discussed in detail in Section I above, Dailey did not plead any facts or request relief that would have put Tirone on notice that Dailey was seeking to pierce the corporate veil, or that he was requesting that the court hold Tirone individually liable for the debts of the corporation.

preserved for review. Lucas v. Rawl Family Ltd.P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004) (holding that it is well settled that an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court); Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007) (stating that to be preserved for review, issues must be raised to and ruled upon by the trial court).

Dailey's failure to file a timely Rule 59(e) motion to reconsider is amplified by the arguments made in his brief. For example, Dailey contends that the Circuit Court "possibly ruled" on a point of law in an "off-the-record" proceeding. (App. Brief p.20). Dailey further argues that the Circuit Court's "off-the-record assessment" was not "clarified in the subsequent written order." Id. Thus, Dailey argues that it is reversible error for a final written order to conflict with a possible ruling made in an off-the-record proceeding. Respondents would respectfully submit that this is a text book example of a situation where Dailey should have filed a Rule 59(e), SCRCP, Motion after the Order dated August 12, 2011, and after the Form 4 Order, so that the issues now placed before this Court could have been raised to and ruled upon by the trial court.[5]

Nevertheless, even assuming that there were a conflict between what the trial judge said on or off the record and the written order, "[t]he judge's final written order represents the decision of the court." Corbin v. Kohler Company, 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct. App. 2002). Indeed, "[n]o order is final until it is written and entered." First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 329, 411 S.E.2d 681, 682

[5] Moreover, Respondents do not concede that the trial court's statements occurred off the record, as the undersigned's recollection of the motion hearing was that the trial court re-visited the motion for summary judgment later during the July 30, 2012 motions hearing while the parties and the court were still on the record. However, Dailey failed to comply with Rule 207, SCACR, when he ordered only the first ten (10) pages of the motion hearing transcript. Rule 207, SCACR provides that "[u]nless the parties otherwise agree in writing, appellant must order a transcript of the entire proceedings below." Rule 207(a)(1), SCACR (emphasis added). Therefore, the litigants and this Court can only speculate about what may or may not have occurred on the record later during the hearing, as well as off the record.

(Ct.App.1991), *aff'd,*308 S.C. 421, 418 S.E.2d 545 (1992). Thus, "[u]ntil written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly." Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001).

To the extent that the Circuit Court determined that Dailey was barred from pursuing a post judgment or supplemental action against Tirone seeking to pierce the corporate veil, the Circuit Court was correct under the facts of this case.

As discussed in Section I, Dailey would not ever be able to pierce the corporate veil as a matter of law. First, Dailey cannot show any fundamental unfairness resulting to him if not allowed to pierce the corporate veil. The only person who has lost money in the corporation is Tirone. See, e.g. Multimedia Publ'g, 314 S.C. at 551, 431 S.E.2d at 569. Even more importantly, Dailey testified that he was a partner of the Respondent Truman's Eclectic Irish Pub, Inc. (R. pp. 221-222; p. 360, line 24-p. 361, line 2; p. 363, lines 7-15; p. 423 ¶ 8). Since he is not a third party to the corporation, he could never be able to pierce the corporate veil. See, e.g., Woodside, 290 S.C. at 370, 350 S.E.2d at 410. Accordingly, a veil piercing claim would have failed as a matter of law, had it been properly asserted in the instant case, and will fail as a matter of law if asserted in a post judgment proceeding. As noted in Drury Development, equity will not require the doing of a futile task or the filing of a pro forma pleading. Id. at 102, 668 S.E.2d at 801. See also Radaszewski v. Telecom Corp., 981 F.2d 305 (8th Cir.1992) cert. denied, 508 U.S. 908, 113 S.Ct. 2338, 124 L.Ed.2d 248 (1993) (holding that since Radaszewski failed to establish an element necessary to pierce the corporate veil in the first action, he would not be allowed to file a futile post judgment action).

For all of these reasons, the trial court did not error in denying Dailey's Rule 60(b) Motion.

III. The Circuit Court properly granted summary judgment in favor of Tirone individually because with or without considering the deposition transcript of Tirone, there was not a scintilla of evidence of Tirone's individual liability.

Dailey next argues that, even disregarding the deposition of Tirone, summary judgment was improper because there is a scintilla of evidence to establish her liability by piercing the corporate veil. In support of this argument, Dailey again addresses only the piercing the corporate veil factors. However, as discussed in detail above in Section I, Dailey failed to put Respondents on notice, through his Second Amended Answer and Counterclaims, that he was going to make a veil piercing argument. See Rule 8(a), SCRCP. Accordingly, the Circuit Court held that Dailey did not plead any facts to support a veil piercing theory and correctly granted summary judgment to Tirone.

IV. The Circuit Court did not commit reversible error in refusing to grant Dailey's request to postpone the hearing, which was made on the date of hearing.

The Circuit Court properly denied Dailey's request to postpone the hearing on the pending Summary Judgment motion.

In the Memorandum of Law, which was filed on the same day as the hearing, and at the hearing, Dailey asked for a continuance so that the transcript of Tirone's deposition could be presented. (R. p. 231; p. 341 (p. 9), lines 19-p.342 (p. 10), line 3). The Circuit Court heard the Summary Judgment Motion.

"Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." State v. McKennedy, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002). Indeed, it is a long-standing tenant of South Carolina law that motions for a continuance are left to

the discretion of the judge and will not be overturned unless there is a clear case of abuse of discretion. Hill v. Hill, 51 S.C. 134, 28 S.E. 309 (1897); McKennedy, 348 S.C. at 270, 559 S.E.2d at 850.

Moreover, Rule 56(f), SCRCP, provides a procedure for litigants to delay a hearing on a motion for summary judgment by submitting an "affidavit" to the court that includes the "reasons" why he cannot "present . . . facts essential to justify his opposition." Rule 56(f) further provides that if such a showing is made, the trial court "may refuse to grant summary judgment or continue the motion." Rule 56(f), SCRCP. Here, Dailey did not present any such affidavit to the Circuit Court as required by Rule 56(f). Further, Dailey's reliance on Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991), is misplaced. In footnote 4, the Court in Baughman noted that Plaintiffs did not file an affidavit to invoke Rule 56(f) but that other courts had not mandated strict compliance with the Rule. Id. In finding that the grant of summary judgment was premature and that the Plaintiffs should have had more time for discovery, despite the lack of an affidavit as required by Rule 56(f), the Court found that (1) plaintiffs had established the likelihood that further discovery would uncover additional relevant evidence; (2) plaintiffs had not been dilatory in conducting discovery on causation and seeking an expert; (3) the defendant had engaged in dilatory discovery conduct which caused "critical information" to be withheld from plaintiff; and (4) the complexity of the case (i.e. 187 named plaintiffs) and the hardship of proving causation. Id. at 113-14, 410 S.E.2d at 544-45. These mitigating factors are simply not present here. Dailey relies on Tirone's deposition to support a theory of liability he chose to improperly raise on the day of the summary judgment hearing that was not contained in

his Second Amended Answer and Counterclaim. Accordingly, the deposition excerpts simply are not relevant. Moreover, as discussed below, Dailey cites portions of Tirone's deposition that are cumulative to the other discovery in the case. In addition, Dailey had more than one year in which he could have but did not take Tirone's deposition. Dailey also failed to identify any improper discovery conduct on the part of Respondents. Finally, this case does not have similar complex causation issues or complexity caused by the number of parties to the litigation. Therefore, the Court was justified in failing to grant the improper request for a continuance.

Presumably, Dailey's request for a continuance, if properly made, would have been supported by his argument that discovery was incomplete since the transcript of Tirone's deposition was not available. However, as discussed in Section I, the trial court's order did not turn on a lack of evidence, but a defect in Dailey's pleadings. Further, as addressed in Section II, Tirone's deposition was cumulative to the other evidence in the case. Moreover, testimony from Tirone's deposition was actually included in Dailey's Memorandum of Law. (R. p. 230).

Accordingly, the Circuit Court did not abuse its discretion by refusing to grant an improper request for a continuance that was not supported by an affidavit as required by Rule 56(f), SCRCP. A continuance was also improper because it would have only allowed Dailey to enter cumulative evidence relating to a claim not raised by or included in the pleadings.

V. Since Dailey never filed a proper Motion to Amend, the Circuit Court did not err in refusing to allow Dailey to amend his pleadings for a third time.

The Circuit Court did not err in refusing to allow Dailey to amend his Pleadings for a third time since Dailey did not file a proper Motion to Amend.

In his Memorandum of Law prepared for the July 30, 2012 hearing, Dailey states, in footnote 2, "[a] party does not need to plead veil piercing as a separate cause of action in South Carolina. To the extent these allegations are not properly encompassed in the Second Amended Counterclaims, Dailey moves to amend his Second Amended Counterclaims consistent with these allegations." (R. p. 229). The Memorandum of Law was filed minutes before the hearing on the Summary Judgment Motion. (R. p. 215; p. 339). During the hearing on the Summary Judgment motion, Dailey moved to amend his Second Amended Counterclaims. (R. p. 341 (p. 7), line 22-p.8, line 6). In footnote 1 to his Motion to Reconsider, Dailey states that "[t]o the extent a motion to amend the counterclaim is necessary, Defendant also makes such a motion." (R. p. 324).

Dailey's footnotes do not constitute a proper motion. Under Rule 7(b), SCRCP, a written motion must state with peculiarity the grounds of the motion, and set forth the relief or order sought. Rule (7)(b)(1), SCRCP. For a Motion to Amend, setting forth the relief sought almost always includes submitting the proposed amended pleading. Rule (7)(b)(1), SCRCP. Further, Rule 11, SCRCP, requires that every motion filed contain "an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held." Rule 11(a), SCRCP. In addition, a party filing a motion has to pay a $25.00 filing fee. S.C. Code Ann. § 8-21-320. The South Carolina Judicial Department also requires that a motion be accompanied by a Motion Cover Sheet (SCCA 233).

In the instant case, no written motion that stated the grounds of the motion and the relief sought was filed with the Circuit Court, and no proposed Third Amended Answer and Counterclaims has been served on Respondents. A footnote in a Memorandum of Law and in the Motion to Reconsider does not constitute the required Rule 11 certification. Further, no motion cover sheet or filing fee was filed by Dailey. Accordingly, no proper motion to amend was made.

Assuming *arguendo* that Dailey did make a proper motion to amend, then the Circuit Court properly denied it. "The decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal." Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct.App.1997). Moreover, the Circuit Court's findings will be overturned "without an abuse of discretion or unless manifest injustice has occurred." Id. See also Brown v. James, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010).

Leave to amend shall be given "when justice so requires and [it] does not prejudice the other party." Rule 15(a), SCRCP. In this case, Respondents would be prejudiced by allowing Dailey to amend his Answer and Counterclaim for a third time to add new issue (veil piercing) not contained in the prior pleadings. As Respondents informed the Circuit Court prior to the Rule 60(b) hearing, allowing amendment to include veil piercing would prejudice the Respondents because Respondents (1) did not conduct any discovery relating to veil piercing in over one year of discovery; (2) did not retain any experts relating to veil piercing; (3) did not raise any defenses to veil piercing; and (4) did not have the time to develop the veil piercing issues for trial. (R. pp. 452-454). Accordingly, there was no error in refusing to allow Dailey to amend his Answer

and Counterclaims for a third time, should this Court determine a proper Motion to Amend was actually made.[6]

CONCLUSION

For the reasons contained herein and as may be raised in any Supplemental Briefs and at oral arguments, the Orders of the Circuit Court should be affirmed in their entireties.

Respectfully submitted,

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July 3, 2013

[6] Respondents were allowed to amend their Pleadings in the same hearing that resolved the motion for summary judgment. However, the trial court allowed the amendment because the "proposed amended pleading does not add any additional parties, does not add any additional causes of action, and does not add any additional theories of liability. In other words, the proposed amendment will not create any additional discovery or otherwise delay the trial of this case. Because the amendment will not prejudice Defendant in any way and will not delay the trial of this case, I find that the amended pleading is due to be and is hereby allowed pursuant to Rule 15(a), SCRCP and Foggie v. CSX Transportation, Inc., 313 S.C. 98, 431 S.E.2d 587 (1993)." (R. p. 17). Allowing Dailey to amend his Second Amended Answer and Counterclaims to add a new theory of liability on the day of the summary judgment hearing would have delayed the trial and materially prejudiced Respondents.

CERTIFICATE OF COUNSEL

The undersigned, J. Ashley Twombley, certifies that this Final Brief of Respondents complies with Rule 211(b).

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THE STATE OF SOUTH CAROLINA
Beaufort County of Common Pleas

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge for Beaufort County

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Case No.: 2011-CP-07-02216
Appellate Case No.: 2012-213582

HELENA P. TIRONE AND TRUMAN'S ECLECTIC IRISH PUB..... Appellants

-vs.-

THOMAS W. DAILEY.....Respondent

CERTIFICATE OF SERVICE

The undersigned, Andrea Smith, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Respondents, and that on the July 3, 2013, a true and accurate copy of the attached of Respondents' Final Brief was placed in an envelope with first class postage thereon prepaid through the United States Postal Service and mailed to the following:

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