

**AMENDED APPEALABILITY MEMORANDA**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

Ct. App. Case No. 2023-00118  
Civil Ct. Case No. 2021-CP-18-01400

Josue Pineda Orellana, ..... Appellant

v.

Trident Construction, LLC, ..... Respondent

**AMENDED APPEALABILITY MEMORANDA**

Appellant Josue Pineda Orellana, by and through his undersigned attorney, respectfully hereby submits this Appealability Memoranda in response to The South Carolina Court of Appeals' request for same, specified in correspondence dated September 29, 2023.

***FACTUAL/PROCEDURAL BACKGROUND***

Trident Construction, LLC ("Trident Construction") was the general contractor hired by a commercial truck dealer and distributor, Worldwide Equipment, to build a new 37,000 square-

foot facility at 78 Jedburg Road, Summerville, South Carolina. Trident supervised the construction, which was performed by various subcontractors either engaged by Trident, or subcontractors engaged by subcontractors. Appellant was an employee of a subcontractor engaged by a subcontractor, Frank's Painting LLC, contracted by Peter's Paint and Wall Covering, which was in turn contracted by Trident Construction.

An August 6, 2018, appellant was assigned to install plastic on the concrete second floor to prevent paint from spraying onto the concrete floor. This was appellant's first day setting foot on the second floor of the Premises. Appellant was placing plastic down by taping down the front of the plastic and walking backwards in a squatting position as he unrolled the plastic. As appellant was moving backwards, he stepped onto a blue foam board (Dow Styrofoam Scoreboard Extruded Polystyrene Insulation with a compression strength of 25 lbs.) that was placed inside of a 2.5 feet by 3.5 feet open hole. The blue Styrofoam hard insulation had been placed in the holes (on the second floor of the Premises) by employees of Trident Construction. As Appellant stepped onto the blue foam board, the blue foam board broke and Plaintiff fell backwards and into the hole, falling approximately 14 feet, landing neck and back first onto the concrete floor below. Plaintiff suffered back fractures, a broken dorsal spine, and damaged tendons, resulting in Plaintiff being paralyzed (a paraplegic).

On August 5, 2021, appellant filed a summons and complaint naming 10 "John Doe" defendants, in addition to multiple other defendants. On May 18, 2023, appellant moved before the Dorchester County Court of Common Pleas to amend his complaint pursuant to Rules 11, 15(b), 15(c), and 37 of the South Carolina rules of Civil Procedure, requesting of the Court an order allowing appellant to amend his complaint to substitute Trident Construction, LLC as the named Defendant in place of Defendant John Doe 1, alleging: no prejudice would result from granting the motion; the claims asserted in appellant's proposed amended pleading arose out of the same conduct and occurrence set forth in the original pleadings; Trident Construction had notice of the institution of said action within the period provided by law for commencement of said action; Trident Construction knew or should have known that, but for a mistake concerning the identity of the proper party, said action would have been brought against Trident Construction, and; the workers' compensation exclusivity doctrine did not apply due to the fact that appellant was not a statutory employee of Trident Construction pursuant to the SC Supreme Court's recent decision in Keene v. CNA Holdings, LLC, Opinion No. 28052, which would not be considered a retroactive application of law pursuant to Zeigler v. Eastman Chemical Company LLC (2022).

Trident Construction responded by moving the court for leave to intervene for the limited purpose of opposing appellant's motion to include Trident as a defendant in said action, alleging: the motion to amend should be denied because it would prejudice Trident Construction; the motion to amend should be denied as futile; the workers' compensation exclusivity defense barred any further claim by appellant against Trident Construction; the Keene case did not alter Trident Construction's status as a statutory employer; Trident Construction was dismissed with prejudice from the workers' compensation action, and; the statute of limitations had expired.

On May 26, 2023, the trial court granted Trident Construction's motion to intervene and denied appellant's motion to amend and substitute, adopting in its order the arguments made by Trident Construction in their memorandum, filed May 18, 2023, and effectively dismissing appellant's claim against Trident Construction. On June 5, 2023, appellant filed a motion to reconsider. On June 9, 2023, the trial court judge issued an order denying appellant's motion to reconsider. Appellant filed this appeal on July 10, 2023.

### ***APPEALABILITY***

An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in section 14-3-330 of the South Carolina Code (1976 & Supp. 2009). Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). An order "involves the merits" when it finally determines a substantial matter forming the whole or a part of some cause of action or defense. Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Additionally, the practical effect of the denial of appellant's motion to amend the complaint and substitute Defendant John Doe 1 for Trident Construction is to strike out the appellant's complaint with respect to the respondent. Appellant contends the portion of the order dealing with denial of appellant's motion to amend and substitute Trident Construction for John Doe 1 is appealable under sections 14-3-330(1) and 14-3-330(2)(c) because it involves the merits and affects a substantial right by effectively striking a pleading.

### ***ORDER DENYING APPELLANT'S MOTION TO AMEND AND SUBSTITUTE PARTIES EFFECTIVELY DISMISSES RESPONDENT FROM THE ACTION WITH PREJUDICE***

Our courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability. *See, e.g., Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (holding on unique facts that an order granting a motion to set aside default was immediately appealable because it had "the effect of . . . granting a motion to dismiss under Rule 12(b)(5), SCRPC, since it ends the action as to [one party]"); Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 114-15, 682 S.E.2d 871, 874 (Ct. App. 2009) (analyzing a "motion to strike" which actually challenges a theory of recovery as a motion to dismiss under 12(b)(6) rather than as a motion to strike).

In Murphy v. Owens-Corning Fiberglas Corp., 346 S.C. 37, 550 S.E.2d 589 (S.C. Ct. App. 2001), the South Carolina Court of Appeals looked to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c). 346 S.C. at 44-45, 550 S.E.2d at 593, overruled on other grounds by Farmer v. Monsanto Corp., 353 S.C. 553, 556-57, 579 S.E.2d 325, 327 (2003). The respondents contended that the order of the circuit court was not immediately appealable because the trial court did not grant the defendant's motion to dismiss with respect to one corporate defendant (because it was a South Carolina corporation), meaning the Murphys' claims against one defendant still remained. 346 S.C. at 43, 550 S.E.2d at 593. Though the order

granting the Rule 12(b)(1), SCRCPP, motion was not a final order, the court found it immediately appealable because it had "the practical effect . . . that it strikes out the Murphys' complaint with respect to [some but not all defendants]." 346 S.C. at 44, 550 S.E.2d at 593.

The respondents in Murphy relied upon State ex rel. McLeod v. C & L Corp., 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984) in support of their argument. 346 S.C. at 43-44, 550 S.E.2d at 593. In McLeod, the trial court granted summary judgment to two defendants during the course of the proceedings. 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984). Although an immediate appeal was not taken, after the entry of a final order, the Attorney General filed a cross appeal raising the issue of summary judgment. Id. The two defendants argued the cross appeal should be dismissed because the summary judgment order was a final order from which an appeal had not been timely perfected. Id. The S.C. supreme court denied the motion to dismiss and transferred the case to the S.C. Court of Appeals for disposition. Id. The S.C. Court of Appeals opinion in McLeod notes the supreme court's ruling on the motion to dismiss was binding. Id. Judge Bell, writing for the S.C. Court of Appeals, stated that the Attorney General's appeal from the final order was sufficient to bring the intermediate order granting summary judgment before the court for review. Id. The opinion states that "[w]hen multiple defendants are joined in the same action, an order dismissing some but not all of them is ordinarily not final or appealable." Id. at 529, 313 S.E.2d at 340.

The Murphy court noted that this particular point regarding dismissal of some, but not all, multiple defendants has not been cited subsequently by our courts. 346 S.C. at 44, 550 S.E.2d at 593. The McLeod case was cited as a general related authority in Plaza Dev. Services v. Joe Harden Builder, Inc., 296 S.C. 115, 370 S.E.2d 893 (Ct.App.1988). In Plaza Development, the S.C. Court of Appeals held that an order granting a Rule 12(b)(6), SCRCPP, motion as to some but not all claims against a single defendant was not immediately appealable. Id. However, the Plaza Development case was overruled on that point by Link v. School Dist. of Pickens County, 302 S.C. 1, 393 S.E.2d 176, nt. 2 (1990). In Link, the S.C. supreme court noted it had previously held in Lebovitz v. Mudd, 289 S.C. 476, 347 S.E.2d 94 (1986) that an order granting a Rule 12(b)(6) motion as to one of multiple claims is directly appealable under S.C. Code Ann. Section 14-3-330(2) because it affects a substantial right and strikes out part of a pleading.

The Murphy court opined that, while it is correct that the grant of the Rule 12(b)(1) motion was not a final order as there was a remaining defendant, the practical effect of the grant of the motion would be to strike out the Murphys' complaint with respect to the respondents. 346 S.C. at 44, 550 S.E.2d at 593. Viewing McLeod in light of Lebovitz and Link, the Murphy court concluded that an order granting a Rule 12 motion as to some, but not all of the defendants in a case, is directly appealable under Section 14-3-330(2) because it affects a substantial right and strikes out part of a pleading. 346 S.C. at 44-45, 550 S.E.2d at 593.

In Miles v. Charleston Light & Water Co., 87 S.C. 254, 69 S.E. 292 (1910), the supreme court considered the defendant's appeal from an interlocutory order denying its motion to make the plaintiff's complaint more definite and certain. 87 S.C. at 255-56, 69 S.E. at 293. After

noting that such an order was not immediately appealable, the court heard the appeal anyway because "appeal has also been taken from the order upon the [defendant's] demurrer, which in effect strikes out a portion of the complaint," making it appealable under the predecessor to section 14-3-330(2)(c). 87 S.C. at 257, 69 S.E. at 293. In Bowden v. Powell, 194 S.C. 482, 10 S.E.2d 8 (1940), the supreme court considered a post-judgment appeal from a pretrial order denying a motion to strike allegations in a complaint. 194 S.C. at 484, 10 S.E.2d at 9. In holding the order was not appealable, the court quoted Harbert to draw a distinction between the order before the court and an order granting a motion to strike a pleading, which the court noted is appealable:

If the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading, and on appeal from the final judgment this court could not say there was error of law in confining the evidence and charge to the pleadings.

Id. (quoting Harbert, 74 S.C. at 16, 53 S.E. at 1002); see also Caldwell v. McCaw, 141 S.C. 86, 91, 139 S.E. 174, 175 (1927).

The S.C. Court of Appeals in Thornton v. South Carolina Electric & Gas Corp. (SCE & G) opined that, under the reasoning of Miles and Bowden, an appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c). 705 S.E.2d 475 (S.C. Ct. App. 2011). An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits and preventing the party from seeking to correct any errors in the order during or after trial. Id. The Thornton court noted that its holding was also supported by the S.C. supreme court's decision in Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000). Id. In Breland, the court ruled that an order denying a motion to change venue was not immediately appealable under section 14-3-330(2)(c), stating: "Immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case." 339 S.C. at 93, 529 S.E.2d at 13. The Breland court held that "[t]he trial court's order did not 'affect' the Defendant's right to venue in the county of its residence because any error in the order can be corrected on appeal following the trial." Id.

The Thornton court went on to state that the decision they reached was consistent with a recent opinion of the supreme court on an interlocutory appeal from an order granting a motion to strike class allegations: Grazia v. South Carolina State Plastering, LLC, Op. No. 26882 (S.C. Sup. Ct. filed Oct. 4, 2010) (Shearouse Adv. Sh. No. 40 at 13). In Grazia, the plaintiffs' claim for defective stucco work fell under The Notice and Opportunity to Cure Construction Dwelling Defect Act, which "requires the claimant to serve written notice no later than ninety days before filing the action." Id. at 19. Neither the Grazias nor any member of the class complied with the notice provision before filing. Id. at 15. Even after the Grazias personally complied with the notice requirement, the trial court granted the defendants' motion to strike class allegations based

on its conclusion as a matter of law that the Act is incompatible with class action procedure. Id. at 15, 18. Although the supreme court did not discuss the appealability of the order, it was immediately appealable. Thornton, 705 S.E.2d 475. By ruling as a matter of law that no class action could be filed under the Right to Cure Act, the lower court order had the effect of removing the issue of class certification from the case and preventing the Grazias from litigating the issue on the merits of Rule 23, SCRPC. Id.

### ***CONCLUSION***

An interlocutory order which is not governed by a specialized appealability statute may not be appealed before the entry of final judgment unless the order fits into one of the categories set forth in section 14-3-330 of the South Carolina Code. In the case at hand, barring the appellant from bringing suit against the general contractor who installed the allegedly hazardous condition that caused appellant's injury, resulting in paraplegia, is certainly a substantial matter forming the whole or part of appellant's cause of action against Trident Construction.

Additionally, as in Murphy and Wetzel, the order denying appellant's motion has the practical effect of granting a motion to dismiss under Rule 12(b)(5) since it ends the action as to one party, and additionally denying the motion has the practical effect of striking out the appellant's complaint with respect to the respondent.

As the S.C. Supreme Court stated in Bowden v. Powell (quoting Harbert), "[i]f the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading, and on appeal from the final judgment this court could not say there was error of law in confining the evidence and charge to the pleadings." If Trident Construction is barred from becoming a defendant in this action, and it is ruled that order is not immediately appealable, there is no later appeal from a final judgment against the remaining defendants that can adequately address the fact that Trident Construction was not a named defendant when the jurors reach their verdict.

Therefore, given the pertinent case and statutory law, and the facts of this case, the portion of the order dealing with denial of appellant's motion to amend and substitute Trident Construction for John Doe 1 is immediately appealable under sections 14-3-330(1) and 14-3-330(2)(c) because it involves the merits and affects a substantial right by effectively striking a pleading.

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