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Dec 04 2023
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
The Honorable R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2022-000369

Stephen Wilkinson, as Trustee of George B. Buchanan, Jr.
Irrevocable Family Trust Dated the 15th day of July, 2001 ……Respondent,

v.

Redd Green Investments, LLC, Anderson North Augusta, LLC,
Herbert Anderson, Jr., A. Bruce Green, Herbert Keith Anderson,
And L. Cliff Redd, ……Defendants,

Of which Redd Green Investments, LLC, A. Bruce Green,
And L. Cliff Redd are……Petitioners.

MOTION TO JOIN IN ARGUMENTS OF PETITIONERS

The Estate of Herbert Anderson, Jr. (the "Estate") hereby respectfully moves this Court for its permission to join in the briefing and oral argument of Petitioners, and to be added as a party to this appeal. Herbert Anderson, Jr. signed the same guaranty agreement as Petitioners A. Bruce Green and L. Cliff Redd.[1] This is an appeal from a directed verdict "in favor of Plaintiff." The Court's decision—to reverse or affirm—will necessarily affect the rights and obligations of the Estate.

[1] Petitioner Redd Green Investments, LLC, signed a different guaranty agreement. (*See* Appendix pp. 85-88; 89-92).

This is an unusual motion spurred by unusual circumstances. Herbert Anderson, Jr., was on his deathbed during the trial below and was unable to attend or testify. He passed away soon thereafter. The trial court ruled "in favor of Plaintiff," and Petitioners appealed. Affirming or reversing the directed verdict would (will) affect all defendants equally. Recently, however, Respondent has attempted to circumvent that outcome by offering to settle with Petitioners for Twenty-Five Thousand ($25,000) dollars each, on the condition that Petitioners end this appeal. If successful, this maneuver could conceivably enable Respondent to proceed against the Estate, alone, for the full judgment amount, now more than Eight Million Dollars. For this reason and those set forth herein, the Estate seeks to invoke well-established law that allows a party to be added to an ongoing appeal. No additional briefing or proceedings are requested; the Estate simply wishes to preserve its interest in reversing the directed verdict, if this Court so rules.

BACKGROUND

This Court issued a writ of certiorari to review the Court of Appeal's decision to affirm the trial court's directed verdict in the amount of $4,781,882.65—a sum derived from an unlawfully-obtained deficiency judgment in a foreclosure action to which the Respondent chose not to make the loan guarantors a party. The Court of Appeals wrongly ruled that the Guarantors were barred from challenging the infected deficiency judgment by the doctrine of *res judicata*—despite that the Guarantors were not made party to the foreclosure action (which was a suit on the mortgage) but were pursued on a deficiency judgment by Respondent later, in a separate action (a suit on guaranty

agreements) involving acts allegedly occurring after the foreclosure judgment was entered (*i.e.*, alleged breach of guaranty).

In a nutshell, at the outset of the foreclosure action, Respondent had two choices: either to demand a deficiency judgment or to waive it. Rule 71, SCRCP. Thus, Respondent could have waived a deficiency judgment and then bid whatever amount Respondent chose at a single foreclosure sale—either driving the bid up to the amount of the debt or buying the property as Respondent's own—in complete satisfaction of the loan. **If Respondent had chosen this first path (no deficiency judgment), then there would have been no subsequent suit on the guaranty agreements because the loan would have been satisfied by the property sale, as a matter of law.**

Instead, however, Respondent chose to demand a deficiency judgment in its foreclosure complaint. Respondent's demand for deficiency judgment triggered the requirements and procedures of Rule 71(b) SCRCP[2] and S.C. Code § 15-39-720.[3] Respondent violated the conditions necessary for obtaining a deficiency judgment by sending his own representative to bid at the second sale. Obviously, the improper procurement of a deficiency judgment was deeply prejudicial to Guarantors, who would

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[2] "Unless the pleadings state that no personal or deficiency judgment is demanded or any right to such judgment is expressly waived in writing, the bidding shall not be closed upon the day of sale but shall remain open until the thirtieth day after such sale exclusive of the day of the sale. The manner and conduct of the bidding when a deficiency has been demanded shall be as required by law."

[3] "But the mortgagee or his representative shall enter such bid as he desires at the time the sale is made, and **he and all persons acting in his behalf shall be precluded from entering any other bid in any amount at any other time** except the single or last bid made by him or in his behalf at the sale." (emphasis added).

not have been sued *at all* if Respondent had followed the rules and bought the property outright (in full satisfaction of the debt).

There is no real question that the trial court was wrong to grant a directed verdict. The court specifically acknowledged that there was evidence Respondent violated statutory law when Respondent's representative bid at the upset sale, which meant there was evidence directly bearing on Guarantors' affirmative defenses.[4] Because of that evidence, there was a jury question, and directed verdict was improper.

There is also no real question that the Court of Appeals mis-applied and confused the doctrine of *res judicata*. The Respondent's subsequent suit against the Guarantors (1) involved different parties and (2) involved a different claim—on the guaranty agreements as opposed to on the mortgage, and on the deficiency judgment instead of on the note. **If the trial court's directed verdict stands, the Respondent will succeed in obtaining an ill-gotten, illegitimate windfall.**

This Court should reverse the directed verdict "in favor of Plaintiff," and the corresponding judgment, which was rendered jointly against all defendants.

This Court's decision will inevitably and inextricably affect the rights and obligations of the Estate of Herbert Anderson, Jr., and the Estate therefore respectfully moves this Court for its permission to be added as a proper party to this appeal.

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[4] THE COURT: "If we're looking at the evidence in the light most favorable to the Defendants, there was a violation of Section 15-39-720, upset bid within thirty days on foreclosure or execution sale. That's an inference that can be drawn." (Appendix p. 232).

STANDARD

An appellate court has the power to permit an interested party to join in, or be added, to an ongoing appeal. Although such authority is exercised rarely, it has its basis both in the rules of civil procedure and in the inherent ability of this Court to act in the interest of justice. Pursuant to Rule 21, SCRCP: "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." (emphasis added). This rule is the same as the Federal Rule, which has been construed broadly. *See Hayward v. Clay*, 456 F. Supp. 1156, 1161 (D. S.C. 1977), *citing Mullaney v. Anderson*, 342 U.S. 415 (1952) ("The breadth of Rule 21 is illustrated by the fact that, like Rule 62, it authorizes appellate courts to apply it to cases on appeal before them. In effect, Rule 21 allows any court possessed of jurisdiction to add parties, even the Supreme Court.").

In deciding whether to permit joinder on appeal, an appellate court should consider whether the addition would (1) prejudice the respondent, (2) affect the litigation, or (3) have a negative impact on judicial economy. *See Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 837 (1989) (approving the use of Rule 21 by appellate courts when a change in the parties "will not affect the litigation or embarrass the defendant"); *Rogers v. Paul*, 382 U.S. 198 (1965) (granting joinder at appellate level where the parties seeking joinder requested the same remedy as the appellants and on the same ground); *Cal. Credit Union League v. City of Anaheim,* 190 F.3d 997, 998 (9th Cir. 1999) (allowing the appellate joinder of a plaintiff to retroactively cure a jurisdictional defect); *Mentor H/S Inc. v. Medical*

Device Alliance Inc., 244 F.3d 1365 (Fed. Cir. 2001) (allowing appellate joinder that would not prejudice the appellee/respondent).

ARGUMENT

This is not a jurisdictional matter[5]—this is a question of whether this Court should, in its discretion, permit the Estate to join as a party in ongoing arguments and briefing to this Court. The Estate respectfully requests that the Court would allow it to do so.

I. Addition of the Estate will not prejudice Respondent, affect the substance of the appeal, nor impair judicial economy.

Respondent will not be legally prejudiced if the Estate joins this appeal. **Respondent either has a valid judgment, or it doesn't. This Court will either reverse the directed verdict, or it won't.** In any event, the addition as a party of a jointly and inseparably obligated Defendant will not move the legal needle for Respondent.

Although the legal term "prejudice" is defined somewhat differently in different contexts, a party is not prejudiced when an action does not affect an outcome and does not require additional briefing or arguments. Nor is a party prejudiced by having to address a meritorious legal point or position. *See Black's Law Dictionary*, "Prejudice" p. 1428 (11th ed. 2019) (Prejudice: "Damage or detriment to one's legal rights or claims."); *cf. Watts v. Chastain*, 438 S.C. 597, 607, 885 S.E.2d 398, 403 (Ct. App. 2022) ("Our courts have defined unfair prejudice as 'an undue tendency to suggest a decision on an improper

[5] This Court has original and appellate jurisdiction here, already having exercised its discretion to issue a writ of certiorari to review the Court of Appeals' decision to affirm the trial court. Rule 242(a), SCACR; *see Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011).

basis.'") (citations omitted); *Myat v. Tuomey Reg'l Med. Ctr.*, 427 S.C. 601, 606, 832 S.E.2d 306, 308 (Ct. App. 2019) ("Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action. . . . The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it.") (internal citations and quotations omitted); *U.S. v. Borromeo*, 945 F.2d 750, 754 (4th Cir. 1991) ("The government is not 'prejudiced' solely because Lily's claim may turn out to be meritorious."). **Here, there is no improper prejudice to Respondent because the addition of the Estate will not alter the issues on appeal or the ultimate outcome.**

The trial court's order granting directed verdict—including its grant from the bench at trial and its Form 4 Order reiterating the same—was broadly "in favor of Plaintiff." (App. pp. 17, 233:6-8). The judge did not distinguish any defendant, nor either guaranty agreement,[6] in any way. The judgment was rendered jointly, as against all defendants. A reversal of the directed verdict "in favor of Plaintiff" would therefore necessarily apply to reverse Plaintiff's entire judgment; the joint judgment cannot and should not be separated by this (or any) Court. *See Scott v. Wells*, 214 S.C. 511, 53 S.E.2d 400 (1949) (reversing judgment as to insured and insurer where their interests were inextricable, although insured had not preserved error on appeal); *Gautam v. Conte*, 571 A.2d 344 (N.J. Super. App. Div. 1990) (reversing judgment *in toto* in legal malpractice

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[6] Presumably, the judgment is based on two separate and distinct guaranty agreements. Mr. Anderson, when living, was a signatory to the same agreement as Petitioner Bruce Green and Petitioner L. Cliff Redd. (App. pp. 89-92). A separate agreement was signed by Petitioner Redd Green Investments, LLC. (App. pp. 85-88). The agreements do not cross-reference one another.

action, although only associate but not partner appealed), *citing E & K Agency, Inc. v. Van Dyke*, 286 A.2d 706 (N.J. 1972) ("Appellate courts of this State, in line with those of many others, have recognized the responsibility of appellate review as including a requirement that the ultimate disposition of a case be just, not only as to parties directly before the reviewing court but also as to others who will perforce be affected by the action of the court. This solicitude has been expressly extended to parties to the litigation who have not appealed but who in all justice should be afforded the benefits of the upper court ruling.").

Because the trial court did not parse out its verdict, the Estate has no unique or additional grounds for reversal which Respondent might be required to oppose. The Estate stands in the same shoes as the Petitioners, and its arguments are therefore identical. In other words, the joinder of the Estate as a party to the appeal will have no material effect on the issues on appeal; it will make no substantive change to the arguments (already briefed); and it will not have a distinct bearing on this Court's ultimate decision to reverse or to affirm the trial court.

Moreover, there will be no prejudicial impact on the speed with which Respondent will learn the outcome of this Court's decision—the oral argument is calendared, the briefing is complete, and the Estate does not seek to extend any deadline or schedule.

Similarly, the joinder of the Estate will not impose an additional burden on this Court. The Estate does not ask this Court to consider, study, or entertain additional arguments or issues on appeal. The Estate simply wants to join with Petitioners as a party to the appeal, and to adopt Petitioners' briefing and legal arguments.

II. But why? And why *now*?

At the time of trial and judgment, Herbert Anderson, Jr., was on his deathbed. (App. p. 154: 4-17) ("Mr. Anderson is eighty years old and he has a doctor's excuse. It's placed up here for your consideration should you wish to look at it to know that he's too ill to be here, but this is still an important case for him."). Mr. Anderson was dying of congestive heart failure and coronary artery disease. Under doctor's orders, he was excused from deposition and trial testimony. (Exhibit 1, Letter from Dr. Hatfield).

The trial proceeded without Mr. Anderson—with Plaintiff, Defendants, and the court all understanding and agreeing that the defendants were defending jointly—Mr. Anderson was relying on Redd and Green's testimony to establish the Guarantors' defenses; the defendants' legal position and arguments were entirely intertwined. (*see, e.g.,* App. p. 126:1-12; p. 182:4-8; p. 227: 14 – 229:10). After the trial concluded, Mr. Anderson's wife (now widow) was worried that the stress of carrying on with the case would be too much for Mr. Anderson.[7] Thus, she asked his attorney not to pursue an appeal. She trusted—with good reason—that Mr. Anderson's interests on appeal would be fairly and completely represented by Redd and Green, who were striving to reverse the directed verdict as a whole and the judgment in its entirety. (*See, e.g.*, App. p. 478) ("In conclusion, the Court of Appeals should reverse the trial court's directed verdict and at the very least allow factual issues to be determined by a jury. In the alternative . . . [it

[7] After a lengthy hospital stay, Herbert Anderson, Jr. ultimately passed away on November 2, 2018, shortly after Petitioners appealed to the Court of Appeals.

should] instruct the trial court to enter judgment in favor of the Guarantors.").

Mrs. Anderson's faith that the judgment would ultimately be entirely reversed has faltered only recently due to disquieting actions taken by Respondent in the past few months. First, on August 24, 2023, Respondent enrolled the judgment with the Clerk of Court for McCormick County, filing it jointly against (1) Cliff Redd, (2) Herbert Anderson, Jr., and (3) Anderson North Augusta LLC. *See* McCormick County Case Number 2023-CP-35-00083. Respondent then filed a motion with the probate court, on August 31, 2023, to have the Estate's Personal Representative removed.[8] Next, just a few weeks later, ***Respondent offered to settle with each of the Petitioners for a truly miniscule sum***, representing a tiny fraction (less than 1%) of the total judgment on appeal. The catch? A condition of any settlement would be that Petitioners drop this appeal. It goes without saying that if Petitioners drop this appeal and settle with Respondent, then the judgment would stand against Herbert Anderson, Jr.

Respondent's obvious scheme is to dodge appellate decision and maintain an intact judgment against the Estate of a dead man. So important is this objective to Respondent that he is willing to let Petitioners walk away—for a song.

The Estate thus seeks to be added as a party to this appeal, so as to preserve its interest in reversing the judgment, particularly in the event that either Mr. Redd or Mr. Green is swayed by Respondent's settlement overtures. Alternatively, and in the event

[8] While the Estate does not believe that Respondent will be successful in its efforts to remove the Personal Representative, it is clear that this move is part of an overall design, calculated to eliminate the appeal and single out the Estate.

of a settlement by Redd or Green, the Estate requests that this Court would permit it to be substituted for such settling party, pursuant to Rule 265, SCACR.

CONCLUSION

There is no prejudice to Respondent that would arise from the Estate being added to this ongoing appeal, nor would such an addition impede judicial economy. The Estate does not intend to submit additional briefing nor to prolong the scheduled argument; its sole request is to be added as a party to the appeal.

For the reasons set forth above, the Estate respectfully requests that this Court grant its Motion and permit it to join the appeal and arguments of Petitioners.

Respectfully submitted,

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