THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No.: 2023-CP-40-00017
Appellate Case No.: 2023-001295

Willie J. Bennett, Appellant,

v.

Sasha N. Gray, Claire H. Eckert, and Chick-fil-A, Inc., Respondents.

INITIAL BRIEF OF RESPONDENT CHICK-FIL-A, INC.

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STATEMENT OF ISSUES ON APPEAL

1. WAS IT AN ABUSE OF DISCRETION FOR THE CIRCUIT COURT TO SUBSTITUTE THE FRANCHISEE, 2CE, LLC, AS A DEFENDANT IN PLACE OF THE FRANCHISOR, CHICK-FIL-A, INC., AND DISMISS CHICK-FIL-A, INC. UPON DETERMINATION THAT CHICK-FIL-A, INC. DID NOT CONTROL NOR HAVE THE RIGHT TO CONTROL THE DAY-TO-DAY OPERATIONS OR MANAGEMENT OF THE CHICK-FIL-A-BRANDED RESTAURANT BUSINESS WHERE THE APPELLANT'S ALLEGED ACCIDENT OCCURRED?

2. IS THE UNAPPEALED ORDER DISMISSING CHICK-FIL-A, INC. THE LAW OF THE CASE?

3. IS THERE A JUSTICIABLE CONTROVERSY PRESERVED FOR APPELLATE REVIEW AS IT RELATES TO THE APPELLANT'S FALSE ALLEGATION THAT HE WAS NOT SERVED WITH A COPY OF CHICK-FIL-A, INC.' S PROPOSED ORDER?

STATEMENT OF THE CASE

This is an alleged personal injury case arising out of a fender bender that occurred on June 17, 2022 in the parking lot of the Chick-fil-A branded restaurant business located at 7424 Garners Ferry Road, Columbia, SC 29209 (the "Restaurant Business"). 2CE, LLC owns and operates the Restaurant Business as a franchisee and independent contractor of Chick-fil-A, Inc. Appellant filed his Complaint, pro se, on January 3, 2023 in the Richland County Court of Common Pleas, naming Sasha Gray, Claire H. Eckert, and Chick-fil-A, Inc. as Defendants. On February 1, 2023, non-party 2CE, LLC made an appearance in the case and filed an Answer, asserting that 2CE, LLC (and not Chick-fil-A, Inc. or Claire H. Eckert) is the proper party against whom Plaintiff's claims should be asserted. On the same day, 2CE, LLC made a motion to be substituted as the proper Defendant in place of Chick-fil-A, Inc. and Claire Eckert (the "Motion"). On February 14, 2023, Chick-fil-A, Inc. answered the Complaint, and filed a Notice of Joinder in the Motion.

On June 23, 2023, Christopher Eckert, the sole member of 2CE, LLC, filed an Affidavit setting forth that 2CE, LLC was "solely responsible for the day-to-day operations and management of the Subject Restaurant Business."

On June 27, 2023, the Court heard the Motion to substitute parties. Thereafter, the Court asked for proposed orders from both Chick-fil-A, Inc. and 2CE, LLC. As separately represented parties, Chick-fil-A, Inc. and 2CE, LLC each filed a separate proposed order upon request by the Circuit Court. Counsel for Chick-fil-A, Inc. served a copy of Chick-fil-A, Inc.'s proposed order on the Appellant via First Class Mail. Thereafter, on July 12, 2023, the Appellant responded via court filing to Defendant Chick-fil-A, Inc.'s proposed Order, further arguing the merits of his case.

On August 11, 2023, the Court entered two Orders – the proposed order submitted by Chick-fil-A, Inc., and the proposed order submitted by 2CE, LLC. The proposed order submitted by Chick-fil-A, Inc. was entered at 2:53PM on August 11, 2023. The proposed order submitted by 2CE, LLC was entered at 2:54PM on August 11, 2023. Thereafter, the Appellant procedurally appealed the 2:54PM Order (submitted by 2CE, LLC), but did not procedurally appeal the 2:53PM Order (submitted by Chick-fil-A, Inc.).

STANDARD OF REVIEW

"A trial court has the sound discretion to substitute parties when some act has affected the capacity of a named party to be sued, and its decision will not be reversed on appeal absent a showing of an abuse of discretion." *Bryant v. Waste Management, Inc.*, 342 S.C. 159, 165, 536 S.E.2d 380, 383 (Ct. App. 2000).

FACTS

The Appellant seeks reversal of the Circuit Court's August 11, 2023 Order (entered at 2:54pm), submitted by 2CE, LLC, which adds 2CE, LLC as a Defendant and dismisses Chick-fil-A, Inc. and Claire Eckert as Defendants (hereinafter referred to as "the 2:54PM Order"). Substantively, the Appellant also purports to seek reversal of the Circuit Court's August 11, 2023 Order (entered at 2:53pm), submitted by Chick-fil-A, Inc., (hereinafter referred to as "the 2:53PM Order") which was limited to substituting 2CE, LLC for Chick-fil-A, Inc. only. The 2:53PM Order, however, was never procedurally appealed by the Appellant. Appellant also seeks review by the Court of Appeals of an alleged failure by Chick-fil-A, Inc.'s counsel to serve all proposed orders on the pro se Appellant.

Because the Appellant failed to appeal the 2:53PM Order (substituting 2CE, LLC for Chick-fil-A, Inc.), any purported "appeal" of that Order is procedurally improper and the dismissal of Chick-fil-A, Inc. in that Order should be the law of the case. However, because the 2:54PM Order also addresses the dismissal of Chick-fil-A, Inc. and substitution of 2CE, LLC in its place, Chick-fil-A, Inc. will address the propriety of the 2:54PM Order herein.

The Court of Appeals should affirm the ruling of the Circuit Court as it relates to the dismissal of Chick-fil-A, Inc. (in both Orders) for the following reasons:

1) The Appellant has not appealed the 2:53PM Order entered by the Circuit Court, thereby making that Order the law of the case.
2) 2CE, LLC owns and operates the Restaurant Business as a franchisee and independent contractor of Chick-fil-A, Inc. 2CE, LLC is solely responsible for the day-to-day operations and management of the Restaurant Business and is responsible for defending Appellant's alleged claims arising out of the subject incident.

There is no basis for the Court of Appeals to take any action as it relates to the Appellant's contention that Counsel for Chick-fil-A, Inc. did not serve him with a copy of the proposed order that was entered at 2:53PM prior to its entry, as that allegation is patently false. This is evidenced by the fact that the Appellant filed a response to the proposed Order before it was entered, which establishes that the Order was, in fact, served on the Appellant. In addition, this issue was not preserved for appellate review.

ARGUMENTS

I. THE LAW OF THE CASE AS TO THE SUBSTITUTION OF CHICK-FIL-A, INC. IS SETTLED BY THE UNAPPEALED 2:53PM ORDER OF THE CIRCUIT COURT.

"An unappealed ruling, right or wrong, is the law of the case." *Atlantic Coast Builders & Contractors, LLC v. Lewis,* 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). In *Atlantic Coast,* the Supreme Court of South Carolina determined that a calculation of damages by a master in equity was unappealed, and therefore was the law of the case whether the calculation was incorrect or not. *Id.*

Here, the Appellant's Notice of Appeal ***only*** addresses the 2:54PM Order. The sole order that is attached to Appellant's Notice of Appeal is the executed 2:54PM Order of Judge Murphy, which was submitted to her, as written, as a proposed order from Counsel for Sasha N. Gray, Claire Eckert, and 2CE, LLC. That proposed order became the 2:54PM Order. The proposed order submitted by Counsel for Chick-fil-A, Inc. and then executed by Judge Murphy (the 2:53PM Order) was not attached to the Notice of Appeal nor referenced in the Notice of Appeal, and was therefore ***not*** appealed by the Appellant. Thus, the law of the case as it relates to Chick-fil-A, Inc. is the finding of Judge Murphy in the 2:53PM Order as follows:

> IT IS HEREBY ORDERED THAT 2CE, LLC, is hereby substituted for Chick-fil-A, Inc. as Plaintiff's claims against Chick-fil-A, Inc. are improper, and 2CE, LLC

> is the real party in interest and the franchisee, owner and operator of the subject Chick-fil-A branded restaurant business. In all future filings, the case caption shall be amended to reflect that 2CE, LLC has been added as a Defendant and Chick-fil-A, Inc. has been dismissed from this action.
>
> Order of Judge Murphy, August 11, 2023, 2:53PM

II. THE CIRCUIT COURT PROPERLY SUBSTITUTED 2CE, LLC FOR CHICK-FIL-A, INC. AS THE REAL PARTY IN INTEREST.

Because the ***only*** appealed Order (the 2:54PM Order), submitted by Counsel for Eckert, Gray, and 2CE, LLC and signed by the Circuit Court, *also included* language substituting Chick-fil-A for 2CE, LLC, Chick-fil-A, Inc. addresses the merits of Appellant's arguments for review by this Court.

Rule 17 and Rule 21 of the South Carolina Rules of Civil Procedure empower the Court to substitute parties such that the true parties in interest are made part of the litigation, preserving both *res judicata* and ensuring the goals of Rule 1 of the South Carolina Rules of Civil Procedure: to ensure the "just, speedy, and inexpensive determination of every action."

First, it is noted that the Appellant makes no argument in support of his presumed assertion that Chick-fil-A, Inc. is a proper defendant in this matter. Appellant cites no case law or any factual or legal basis to support any argument that his claims are properly asserted against Chick-fil-A, Inc. The Circuit Court correctly found that the proper Defendant (2CE, LLC) should be substituted for the improper defendant (Chick-fil-A, Inc.). Appellant provides no factual or legal basis (nor is there any) that Chick-fil-A, Inc. is a proper defendant in this action, and therefore, the Circuit Court's Order should be affirmed.

The appealed Order sets forth the reasoning of the Circuit Court in granting substitution of the parties, an act that the Circuit Court is empowered to take, as Rule 21 sets forth, "on motion of any party ***or of its own initiative at any stage***..." (emphasis added). Appellant is not

without recourse to pursue any alleged claims arising out of the incident. The appealed Order substituting the franchisee, 2CE, LLC, in place of the franchisor, Chick-fil-A, Inc., permits the Appellant to pursue his claims **against the proper entity** – 2CE, LLC.

Georgia law, which is consistent with South Carolina law on this issue, applies to the question of whether 2CE, LLC is a proper party. The Franchise Agreement expressly states:

> This Agreement is made and takes effect when accepted and executed by Chick-fil-A in the State of Georgia. All rights, duties and obligations of the parties hereto arising out of or relating to the subject matter of this Agreement shall be governed, construed, interpreted and ***enforced solely under the laws and decisions of the State of Georgia*** as they exist on the effective date of this Agreement and thereafter may be amended or changed from time to time (except and without reference to any conflict of law principles, rules and decisions), including without limitation all controversies, disputes and claims of any nature between the parties arising out of or relating to the validity, performance, interpretation, enforcement, termination or expiration of this Agreement, including any Lease(s) which are attached hereto as an exhibit, Chick-fil-A's right to enter upon and take possession of any Site, and any other aspect of the parties' agreement or relationship. The laws of the State of Georgia shall prevail and otherwise be applied to all such disputes in the event of any conflict of laws.

Franchise Agreement, ¶ 28.9.

South Carolina courts have long recognized the right of parties to enter an agreement to choose a particular state's laws to govern their agreement. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 248, 717 S.E.2d 103, 108-109 (Ct. App. 2011). Unless application of foreign law violates South Carolina public policy, choice of law provisions are routinely enforced by South Carolina courts. *See id.* at 249, 717 S.E.2d at 109.

Chick-fil-A, Inc. is a Georgia corporation whose principal place of business is located in Atlanta, Georgia. *See* Franchise Agreement, Cover Page. As demonstrated below, Georgia law is consistent with South Carolina law governing franchise and independent contractor relationships. Accordingly, the application of Georgia and South Carolina law to the question

whether Chick-fil-A, Inc. should be substituted for 2CE, LLC as the proper defendant is appropriate.

Although an employer may be held vicariously liable for the negligence of its employees or agents under Georgia and South Carolina law, a company's vicarious liability for the conduct of an independent contractor is limited. *See* O.C.G.A. §§ 51-2-4, 51-2-5. Whether a franchisor can be held liable for the alleged misconduct of its franchisee depends, in essence, upon whether the franchisee is an employee or independent contractor. *See, e.g., Pizza K, Inc. v. Santagata*, 547 S.E.2d 405, 406 (Ga. Ct. App. 2001); *Schlotzsky's, Inc. v. Hyde*, 538 S.E.2d 561, 562 (Ga. Ct. App. 2000); *McGuire v. Radisson Hotels Int'l, Inc.*, 435 S.E.2d 51, 52 (Ga. Ct. App. 1993).

To impose liability on a franchisor for the conduct of a franchisee, it must be shown that "the franchisee is not a franchisee in fact but a mere agent or 'alter ego' of the franchisor." *Schlotzsky's, Inc. v. Hyde,* 538 S.E.2d 561, 562 (quoting *McMullan v. Georgia Girl Fashions*, 348 S.E.2d 748, 750 (Ga. Ct. App. 1986)). The question, therefore, is whether 2CE, LLC was Chick-fil-A, Inc.'s agent or, instead, an independent franchisee. "The historical test applied by Georgia courts [on this question] has been whether the contract gives, or the employer assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity with the contract." *Schlotzsky's, Inc. v. Hyde,* 538 S.E.2d 561, 562 (quoting *McMullan v. Georgia Girl Fashions*, 348 S.E.2d 748, 750 (Ga. Ct. App. 1986)).

Like Georgia, South Carolina law also limits the liability of a company for the conduct of a franchisee or independent contractor. While a company may be held vicariously liable for the negligence of its employees or agents, a company generally cannot be held vicariously liable for the conduct of an independent contractor under South Carolina law. *Creighton v. Coligny Plaza*

Ltd. P'ship, 334 S.C. 96, 116, 512 S.E.2d 510, 520 (Ct. App. 1998). Likewise, a franchisor cannot be held liable for the acts or omissions of its franchisee unless the franchisee is an agent of the franchisor. *See Jamison v. Morris*, 385 S.C. 215, 222, 684 S.E.2d 168, 172 (2009). The burden of proving agency status is on the party asserting it, and will not be assumed. *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996) ("'A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts'") (quoting *Orphan Aid Soc. v. Jenkins*, 294 S.C. 106, 109, 362 S.E.2d 885, 887 (Ct. App. 1987)). Like Georgia, the test to determine agency under South Carolina law "is whether or not the purported principal has the *right to control* the conduct of his alleged agent." *Fernander v. Thigpen*, 278 S.C. 140, 144, 293 S.E.2d 424, 426 (1982) (emphasis in original). Unlike in *Fernander*, where an assistant manager and another employee testified that they believed the franchisor employed them, 2CE, LLC is required to inform its employees that they are not employed by Chick-fil-A, Inc. *See* Franchise Agreement ¶ 25.1; *see also Young v. Warr*, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969) ("The general test applied is . . . whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment").

The Georgia Court of Appeals' decision in *Schlotzsky's* is applicable to the case presently before the Court. In *Schlotzsky's*, the plaintiffs alleged that they contracted Hepatitis A from eating tainted food at a Schlotzsky's Deli franchise owned and operated by Tidwell Food Company ("Tidwell"). *Schlotzsky's*, 538 S.E.2d at 561-62. Schlotzsky's moved for summary judgment, arguing that Tidwell was an independent contractor and that Schlotzsky's, therefore, could not be held vicariously liable for the alleged negligence of its franchisee. *Id.* at 562. The

Georgia Court of Appeals held that the trial court erred in denying Schlotzsky's motion for summary judgment on the issue of vicarious liability. *Id.* at 563.

Like the Franchise Agreement governing the relationship between 2CE, LLC and Chick-fil-A, Inc., the franchise agreement between Schlotzsky's and Tidwell provided that Tidwell was "an independent contractor and shall not be considered an agent, partner, or joint venturer of Schlotzsky's." *Schlotzsky's*, 538 S.E.2d at 562. The plaintiff nevertheless argued that the franchise agreement and operations manual gave Schlotzsky's the right to control the time, manner, and method of the franchisee's work and, therefore, Schlotzsky's could be held vicariously liable for the negligence of its franchisee. *Id.*

The Georgia Court of Appeals observed that "although the Franchise contract and operations manual set forth very detailed standards pertaining to food preparation, hygiene, and sanitation, Schlotzsky's did not reserve to itself the right to control the time, manner, or method in which Tidwell Food Company, through its employees, actually executed those standards." *Schlotzsky's*, 538 S.E.2d at 562. Nothing in the operations manual gave Schlotzsky's supervisory control over the franchisee's day-to-day work. *Id.* The mandatory standards set forth in the operations manual were, instead, a "means of achieving a certain level of quality and uniformity within the [Schlotzsky's] system." *Id.* at 563 (quoting *McGuire*, 435 S.E.2d at 53).

Significantly, the Georgia Court of Appeals emphasized in *Schlotzsky's* that a franchisor can set standards for its franchise operations without compromising the nature of its relationship with its franchisees as independent contractors:

> As we have held, a franchisor may protect its franchise and its trade name by setting standards governing its franchisee's operations, including how its product is manufactured, packaged, prepared, or served. Further, these standards may be quite detailed, specific, and strict. A franchisor's reserving the right to inspect, monitor, or evaluate the franchisee's compliance with its

> standards and to terminate the franchise for noncompliance is ***not*** the equivalent of retaining day-to-day supervisory control of the franchisee's business operations as a matter of law.

Schlotzsky's, 538 S.E.2d at 563 (emphasis added) (citations omitted); *see also Pizza K*, 547 S.E.2d at 407 (reversing trial court's denial of summary judgment in favor of franchisor); *Baldino's Giant Jersey Subs, Inc. v. Taylor*, 454 S.E.2d 599, 600 (Ga. Ct. App. 1995) (same).

Notably, the Georgia Court of Appeals recently affirmed the principles set forth in *Schlotzsky's* and *Pizza K* that a "franchisor may set detailed and specific standards regarding how a franchisee manufactures, packages, prepares, or serves the franchisor's product," and "[t]he decision to implement such standards, monitor compliance, or terminate a franchisee for noncompliance 'is not the equivalent of retaining day-to-day supervisory control of the franchisee's business operations.'" *McKee Foods Corp. v. Lawrence*, 712 S.E.2d 79, 82 (Ga. Ct. App. 2011).

Similarly, in *Jamison v. Morris*, 385 S.C. 215, 684 S.E.2d 168 (2009), the South Carolina Supreme Court held that a franchisor cannot be held vicariously liable for the alleged negligence of a franchisee in the absence of evidence that the franchisor controls the franchisee in the performance of its work and the manner in which the work is to be done. *Id.* at 222, 684 S.E.2d at 171. In *Jamison*, Louis was involved in a car accident while he was a passenger in a vehicle driven by Davis, who was intoxicated. Davis illegally purchased alcohol from Mini Mart, which operated a Texaco-branded service station. Mini Mart received its gasoline from Anderson (a "jobber"), which in turn purchased gasoline from Texaco. Louis argued that Anderson and Texaco should be held vicariously liable for Mini Mart's illegal sale of alcohol to Davis.

To support his argument that Anderson and Texaco exercised "control" over Mini Mart's daily operations, Louis pointed to Texaco's requirements regarding employee appearance, displays, hours of operation, signage and cleanliness and hygiene standards. *Id.* at 223, 684

S.E.2d at 172. The Supreme Court agreed with Texaco's argument that these requirements were appropriate and necessary to ensure uniformity of appearance and quality of service among Texaco's franchisees, and to preserve Texaco's trademark and its good will. *Id.* at 224-25, 684 S.E.2d at 172-173. The Supreme Court, therefore, held that the trial court erred in submitting the issue of Texaco and Anderson's vicarious liability to the jury. *Id.* at 225, 684 S.E.2d at 173; *see also Watkins v. Mobil Oil Corp.*, 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986) (franchisor could not be held vicariously liable for franchisee's conduct where there was no evidence that franchisor asserted any right to control franchisee's business or its employees); *Allen v. Greenville Hotel Partners, Inc.*, 409 F. Supp. 2d 672, 679 (D. S.C. 2006) (franchisor entitled to summary judgment where there was no evidence that franchisor controlled the franchisee hotel's daily operations but "merely maintained 'uniform service within, and public good will toward, the [franchise] system'" through the requirements set forth in the franchise agreement).

Like the franchisors in *Schlotzsky's* and *Jamison,* Chick-fil-A, Inc. requires its franchisees to achieve certain levels and specifications of product quality, cleanliness, sanitation, and operation. Franchise Agreement at ¶ 1(j). Food products must be prepared in accordance with the methods specified by Chick-fil-A, Inc. *Id.* ¶ 1(i). Additionally, Chick-fil-A, Inc. may inspect the Restaurant Business at any time to ensure compliance with the Minimum Standards. *Id.* ¶ 13.1. These standards and requirements are vital to protect Chick-fil-A, Inc.'s trademarks and the goodwill associated with those marks, the high quality of Chick-fil-A products, and the sanitation of Chick-fil-A branded restaurant businesses.

Moreover, "to protect the public image of and goodwill associated with" Chick-fil-A, Inc.'s trademarks, franchisees are required to open and operate their restaurant businesses six days each week, excluding Sundays. Franchise Agreement at ¶12.1(b). This limitation on a

franchisee's hours of operation in *Pizza K* was not sufficient to preclude summary judgment in the franchisor's favor. *Id.*, 547 S.E.2d at 406; *see also Domino's Pizza, LLC v. Reddy*, 2015 WL 1247349 (Court of Appeals Ninth District of Texas at Beaumont, March 19, 2015) at *3 (limitations on the franchisee's delivery area were not sufficient to establish supervisory control over daily operations). Moreover, the Franchise Agreement confirms that the quality guidelines established by Chick-fil-A, Inc. are not intended to control or affect the time, manner, or method of the day-to-day operation of the restaurant. Franchise Agreement at ¶ 25.2.

It is undisputed that Chick-fil-A, Inc. did not exercise any supervisory control over the daily operations of the Restaurant Business on the date of the alleged incident. *See id.* This could not be more clearly set forth than in the affidavit executed by Christopher M. Eckert, the sole member of 2CE, LLC (the franchisee, owner and operator of the Restaurant Business). Mr. Eckert states in paragraphs 6-10 of his affidavit:

> 6. As the franchisee, owner and operator of the Subject Restaurant Business, 2CE, LLC was solely responsible for the day-to day operations and management of the Subject Restaurant Business on the day of the subject incident.
> 7. The individuals who worked at the Subject Restaurant Business on June 17, 2022, were employed by 2CE, LLC. 2CE, LLC was solely responsible for supervising and training its employees including all responsibilities with regard to delivery drivers. No one employed by CFA, Inc. [Chick-fil-A, Inc.] was on the premises of the subject Restaurant Business on June 17, 2022.
> 8. Sasha Gray was employed by 2CE, LLC on June 17, 2022, as a delivery driver.
> 9. CFA, Inc. [Chick-fil-A, Inc.], as the franchisor did not and does not exert any control over the day-to-day operations of the Subject Restaurant Business, including the training, directing and supervising of delivery drivers.
> 10. Claire Eckert, who is named as a Defendant in this matter, is not a member of 2CE, LLC.; has no control over business operations, including but not limited to the hiring or training of any employees and/or drivers of 2CE, LLC; is not an owner-operator; nor was she assigned any rights under the Assignment Agreement.

Affidavit of Christopher M. Eckert dated June 23, 2023.

Under clear precedent in Georgia and South Carolina, Chick-fil-A, Inc. is entitled to protect its franchise and its trade name by setting standards that govern its franchise operations. *See, e.g., Schlotzsky's*, 538 S.E.2d at 563 ("As we have held, a franchisor may protect its franchise and its trade name by setting standards governing its franchisee's operations... Further, these standards may be quite detailed, specific, and strict.") (internal citations omitted); *Domino's Pizza, LLC*, 2015 WL 1247349 at *2 (implementing minimum guidelines for the operation of all Domino's stores in order to promote the Domino's brand and trademarks in a favorable manner does not defeat the independent contractor relationship); *see also Allen*, 409 F. Supp. 2d at 677 (noting that the "'clear trend in the case law in other jurisdictions is that the quality and operational standards and inspection rights contained in a franchise agreement do not establish a franchisor's control or right of control over the franchisee sufficient to ground a claim for vicarious liability as a general matter.'") (citations omitted).

That Chick-fil-A, Inc. has set specific standards and monitors its franchisees to ensure compliance with these standards is insufficient under Georgia or South Carolina law to support a finding of vicarious liability and prohibit substitution of defendants. Nor is the appearance of the Chick-fil-A trademark or logo at the Restaurant Business or on the employees' uniforms sufficient to create a basis for a jury to infer an agency relationship. As set forth in the Franchise Agreement, 2CE, LLC had the right and license to use Chick-fil-A, Inc.'s trademarks in connection with the operation and promotion of the Restaurant Business. Franchise Agreement at ¶¶ 12.1(e), 19.1.

In short, the undisputed evidence demonstrates that 2CE, LLC is an independent contractor of Chick-fil-A, Inc., and not its employee, agent or alter ego, under Georgia law **and**

South Carolina law. Because it is clear from the record that Chick-fil-A, Inc. cannot be held directly or vicariously liable for Appellant's claims, the Circuit Court did not err in ruling that 2CE, LLC should be substituted in place of Chick-fil-A, Inc. Thus, Chick-fil-A, Inc. respectfully requests that the Order of the Circuit Court, dismissing Chick-fil-A, Inc., be affirmed.

III. THERE IS NO PRESERVED ISSUE FOR APPELLATE REVIEW AS IT RELATES TO THE ALLEGED FAILURE OF CHICK-FIL-A, INC. TO SERVE THE APPELLANT WITH A COPY OF THE PROPOSED ORDER AS THIS ISSUE WAS NOT RAISED AND RULED ON BY THE CIRCUIT COURT. IN ADDITION, IT IS FACTUALLY INACCURATE IN ANY EVENT BECAUSE CHICK-FIL-A, INC. DID SERVE ITS PROPOSED ORDER ON THE APPELLANT ON THE SAME DAY IT WAS SUBMITTED AS A PROPOSED ORDER ON E-FILE.

The Appellant's Brief asserts that Respondent Chick-fil-A, Inc. allegedly failed to serve the Appellant with a copy of its proposed Order that was entered by the Circuit Court as the 2:53PM Order. This allegation is completely false and the Appellant has suffered no prejudice. Most clearly, the allegation is proven false by the fact that the Appellant responded to Chick-fil-A, Inc.'s proposed Order with his own filing, dated July 12, 2023 (nearly a month *before* the 2:53PM Order was entered) which was titled, "Plaintiff Response to Defendant Chick-fil-A, Inc's Motion to Substitute Real Party in Interest Pursuant to Rule 17, SCRCP," and begins as follows: "In Response to Defendant's Proposed Order Granting Defendant Chick-fil-A, Inc.'s Motion to Substitute Real Party in Interest Pursuant to Rule 17, SCRCP, Plaintiff disagrees to the Defendant's Motion to Substitute." In addition, Appellant's complaints about allegedly not being served with Chick-fil-A, Inc.'s proposed order were not timely raised and ruled on by the Circuit Court. Accordingly, any such complaints (which have no merit in any event) cannot be considered by this Court. *See e.g., Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997) (an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate

review); *see also Sloan v. Greenville County,* 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) ("The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation.").

Although this matter was not preserved for appeal and should not be considered, in any event, the Appellant's argument is completely undermined by the facts. Chick-fil-A, Inc.'s counsel served the Appellant with the Proposed Order Granting Defendant Chick-fil-A, Inc.'s Motion to Substitute Real Party in Interest Pursuant to Rule 17, SCRCP by mail on June 29, 2023 (which is the same day it was e-filed). Having indisputably received the proposed Order by mail, Appellant filed a Motion opposing Chick-fil-A, Inc.'s proposed order on July 12, 2023. Nearly a month later, on August 11, 2023, the Circuit Court entered the 2:53PM Order. Appellant's contention that he was not served with the proposed Order is belied by the fact that he filed a response to the proposed Order two weeks after it was served on him.

In his July 12, 2023 response to Chick-fil-A, Inc.'s proposed Order, Appellant offered numerous reasons for why he believed the Circuit Court should not enter Chick-fil-A, Inc.'s proposed Order. Over Appellant's objections, the Circuit Court properly entered Chick-fil-A, Inc.'s proposed Order on August 11, 2023, substituting 2CE, LLC in place of Chick-fil-A, Inc. Despite his fallacious allegations, Appellant was neither "prejudiced" nor deprived of the opportunity to file a response to the proposed Order.

In addition, the Circuit Court specifically advised at the hearing, held on June 27, 2023, that the Circuit Court did not need anything from Appellant in order to rule on the pending motions:

> THE COURT: ... But in the meantime, I'm going to ask for proposed orders from counsel based upon what the arguments have been. And if I need a proposed order from

you, Mr. Bennett, I'll ask separately so that you don't have to draft something quite yet unless it's needed. I can have my law clerk contact all the parties if that's something that's necessary later. Okay.
MR. BENNETT: Okay.

Transcript of Circuit Court hearing held on June 27, 2023, page 23.

The Circuit Court went on to state to Appellant:

THE COURT: No, sir, I think you have it all. I've asked counsel to draft a proposed order with the rulings that have been articulated here this morning as well as proposed orders for anything that will be outstanding. That way, it's not upon you to draft the orders and I can look at them and change them accordingly, depending on my ruling. But I'm giving you 30 days to respond and submit the documentation that was requested. If not, you'll end up having to pay for the attorney's fees.
MR. BENNETT: Okay. I understand.

Transcript of Circuit Court hearing held on June 27, 2023, pages 26-27.

Regardless of the fact that there is no merit to Appellant's contention that Chick-fil-A, Inc.'s proposed Order was not served on him before it was entered by the Court, it is undisputed that Appellant did not timely raise this issue to the Circuit Court and the Circuit Court did not rule on this issue, and therefore, there is no determination for this Appellate Court to review.

CONCLUSION

Appellant did not appeal the 2:53PM Order dismissing Chick-fil-A, Inc. and therefore, it is the law of the case. Even if this Court finds that Appellant did appeal the 2:53PM Order, the law in Georgia and South Carolina clearly establishes that Chick-fil-A, Inc. is not the proper party against whom Appellant's claims should be asserted. Accordingly, the Circuit Court did not err in entering the 2:53PM Order (submitted by Chick-fil-A, Inc.) or the 2:54PM Order (submitted by 2CE, LLC) – both of which properly substituted 2CE, LLC in place of Chick-fil-A, Inc. Chick-fil-A, Inc. therefore respectfully requests that this Court affirm the 2:53PM Order (and the 2:54PM Order) and remand the case to the Circuit Court in order that Appellant's claims may proceed against the proper defendant – 2CE, LLC.

February 1, 2024

SWEENY, WINGATE & BARROW, P.A.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No.: 2023-CP-40-00017
Appellate Case No.: 2023-001295

Willie J. Bennett, Appellant,

v.

Sasha N. Gray, Claire H. Eckert, and Chick-fil-A, Inc., Respondents.

RESPONDENT CHICK-FIL-A, INC.'S
PROOF OF SERVICE FOR INITIAL BRIEF

I certify that I have served the Initial Brief on Pro Se Appellant via Process Server and First-Class Mail and Counsel of Record by depositing a copy of it in the United States Mail, postage prepaid, on February 1, 2024, addressed to Pro Se Plaintiff and attorney of record, listed as follows and to the process server:

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Hopkins, South Carolina 29061

Kelsey J. Brudvig, Esquire
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February 1, 2024

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S·W·B

SWEENY WINGATE & BARROW P.A.

February 1, 2024

Reply to: Main Office

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VIA ELECTRONIC FILING
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29202

RE: Bennett v. Chick-fil-A, Inc., et al.
Civil Action No.: 2023CP4000017
Our File: 6877-14403

Dear Ms. Kitchings:

Enclosed for filing is the Initial Brief of Respondent Chick-fil-A, Inc. with Proof of Service, and the Designation of Matter with Proof of Service in the above case.

By copy hereof, Appellant Pro Se and all counsel of record are being served with the above.

Thank you for your assistance, and should you have any questions, please do not hesitate to contact me.

Yours truly,

SWEENY, WINGATE & BARROW, P.A.

Christy E. Mahon

CEM/mha
Enclosures

VIA ELECTRONIC TRANSMSSION, FIRST-CLASS MAIL AND PROCESS SERVER
Willie Bennett, Appeallant Pro Se

VIA ELECTRONIC TRANSMSSION AND FIRST-CLASS MAIL
Kelsey Brudvig, Esquire