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SC Court of Appeals

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 RESPONDENTS SASHA N. GRAY AND CLAIRE H. ECKERT

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STATEMENT OF THE CASE

This is an alleged personal injury case arising out of a fender-bender in the parking lot of a franchise-owned, Chick-fil-A-branded restaurant in Columbia, South Carolina on June 17, 2022. 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, Defendant 2CE, LLC made an appearance in the case and filed an Answer, asserting that 2CE, LLC is the real party in interest. (Answer). On the same day, pursuant to Rule 17, SCRCP, 2CE, LLC moved to be substituted for Claire H. Eckert and Chick-fil-A, Inc. (Motion to Substitute). Chick-fil-A, Inc. answered on February 14, 2023, and joined Defendant 2CE, LLC's motion to substitute the parties. (Motion to Join).

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." (Affidavit of Christopher Eckert).

On June 27, 2023, the Court heard the Motion to substitute parties.[1] Thereafter, the Court asked for proposed orders from both defendants: Chick-fil-A, Inc. and 2CE, LLC. Undersigned counsel provided the Court with its proposed Order Granting the Motion to Substitute.

[1] There were several motions pending before the Circuit Court. Respondents maintain that Plaintiff has only appealed the Order granting 2CE, LLC's Motion to Substitute. Plaintiff appealed the Court's Order Denying several discovery motions. However, this Court dismissed the appeal as an improper interlocutory appeal related to discovery. November 7, 2023, Order, Case No. 2023-001619.

On August 11, 2023, the Court entered its Order granting 2CE, LLC's Motion to Substitute.[2] Subsequently, Appellate filed his Notice of Appeal of the Order Granting 2CE, LLC's Motion to Substitute.[3] (Order).

STATEMENT OF FACTS

Appellant Willie J. Bennett ("Appellant"), *pro se*, commenced this action on January 3, 2023. In his Complaint, Appellant alleges that on June 17, 2022, Respondent Sasha N. Gray hit his parked vehicle in the parking lot of the subject Chick-fil-A branded restaurant. (Compl. ¶ 10). In additional to Defendant Gray, Appellant asserted allegations against Respondents Claire Eckert and Chick-fil-A, Inc. Appellant alleged that Chick-fil-A, Inc. "owns and operates the store know [sic] as the Chick-Fil-A located at 7424 Garners Ferry Road, Columbia, South Carolina 29209." (Compl. ¶ 4). Appellant asserted a single cause of action against Respondents for "Negligence (Premises Liability)."

On January 1, 2015, Chick-fil-A, Inc. and Christopher Eckert entered into a Franchise Agreement (Chick-fil-A Operator), whereby Chick-fil-A, Inc. licensed and granted to Eckert the right to own and operate a franchise pursuant to the terms and conditions of the Franchise Agreement. (Franchise Agreement, relevant sections). On the same effective date, the assignor operator Eckert assigned, transferred, and set over to 2CE, LLC, the Assignee, all the "right title and interest of Assignor [Eckert] in and to the Franchise, including the Franchise Agreement and its attached Lease(s) identified above, and any amendments and exhibits thereto, and the Business, such to the terms and conditions therein." (Assignment and Consent to Assignment Agreement, Section 1.1, relevant sections). Further, 2CE, LLC assumed all of Eckert's duties, obligations,

[2] A separate Order—submitted by Chick-fil-A, Inc.—was entered on the same date.
[3] Appellant did not file a Notice of Appeal of the Order submitted by Chick-fil-A, Inc.

agreements, commitments and liabilities under the Franchise, including the Franchise Agreement. (Assignment and Consent to Assignment Agreement, Section 1.2).

With regard to duties, obligations, agreements, commitments and liabilities under the Franchise, including the Franchise Agreement, Section 5 of the Franchise Agreement states, in relevant part: "The Operator shall be solely and exclusively responsible for any and all liability of the Operators and/or Chick-fil-A for personal injury, damage or loss caused by or resulting from any act or omission of the Operator, the Operator's employees, agents, contractors, invitees or customers." (Franchise Agreement, Section 5). Further, Respondents averred that Respondent Sasha N. Gray is an employee of 2CE, LLC and was operating the subject vehicle in the course and scope of her employment with 2CE, LLC.

Respondent Claire H. Eckert is not a member of 2CE, LLC. She does not train, supervise, direct, or manage any employees of 2CE, LLC, including its delivery drivers—the role of Gray at the time of the subject incident. (Affidavit of Claire H. Eckert).

Christopher Eckert is the sole member of 2CE, LLC, which is a limited liability company formed and organized for the sole purpose of owning and operating the subject Chick-fil-A branded restaurant. As the franchisee, owner and operator of the subject restaurant, 2CE, LLC was solely responsible for the day-to-day operations and management of the subject restaurant on the day of the subject incident. The individuals who worked at the subject restaurant on June 17, 2022—including Sasha Gray—were employed by 2CE, LLC. 2CE, LLC was solely responsible for supervising and training its employees, including all responsibilities with regard to delivery drivers. Further, Claire Eckert is not a member of 2CE, LLC, had no control over business operations, including but not limited to the hiring or training of any employees and/or drivers of 2CE, LLC, and was not an owner-operator. (Affidavit of Christopher Eckert).

The Court heard Respondents' Motion on June 27, 2023. By way of Order entered on August 11, 2023, the Court granted Respondents' Motion to Substitute. In the Order, the Court noted that it considered the motion, submitted documents and materials, and oral arguments. (Order, p. 1). The Court held that Chick-fil-A, Inc. and Claire Eckart were not real parties in interest, based on the Franchise Agreement and affidavit testimony. Specifically, the Court found that Chick-fil-A, Inc. had no interest in the day-to-day operations of the subject restaurant and is not responsible for any liability for personal injury resulting out of the act or omission of the Operator's employees. The Court further held that Claire Eckert had no control over business operations, including but not limited to any employees of 2CE, LLC. The Court concluded that 2CE, LLC is a real party in interest and should be substituted in the place of Chick-fil-A, Inc. and Claire H. Eckert.

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). "An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012).

ARGUMENT

I. The Circuit Court Did Not Abuse Its Discretion in Granting Respondents' Motion to Substitute 2CE, LLC As the Real Party In Interest, In Place of Chick-fil-A, Inc. and Claire Eckert.

Appellant argues that the Circuit Court erred in granting Respondents' Motion to Substitute 2CE, LLC in place of Respondents Claire H. Eckert and Chick-fil-A, Inc. Appellant alleges that Respondent Claire H. Eckert "owned a fleet of vehicles in her name and has since disposed of them." Appellant goes on to argue that the Court erred "in denying or considering Appellant motions to compel documents and things and answers to interrogatories as well as denying this him [sic] access and due process to the law under the due process Claus [sic] of the Fourteenth Amendment of the United States Constitution." (App. Br. p. 3). Appellant further references a "grant of partial summary judgment" as being "premature."

Respondents maintain that the Circuit Court did not abuse its discretion in granting Respondents' Motion to Substitute. Further, Appellant mistakenly references a grant of partial summary judgment which is not part of any Order of the Circuit Court. Finally, Appellant's reference to discovery orders is not properly preserved for appeal.

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

As an initial matter, Appellant makes no substantive argument as to why Chick-fil-A, Inc. and/or Claire H. Eckert are proper parties to this litigation. The Circuit Court properly held that 2CE, LLC is a real party in interest, and that Chick-fil-A, Inc. and Claire H. Eckert are not proper parties in interest. Therefore, the Circuit Court's Order should be affirmed.

Even in the most liberal construction of Appellant's arguments, the Circuit Court did not abuse its discretion granting Respondents' Motion to Substitute. The Circuit Court's Order is not controlled by any error of law and there is evidentiary support for the Circuit Court's factual conclusions.

a. Substitution of 2CE, LLC in Place of Chick-fil-A, Inc.

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 into 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. (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 2CE, LLC should be substituted in place of Chick-fil-A, Inc. 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. (Franchise Agreement ¶ 25.1). S*ee 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 and, 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 CFA, 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 Garner's Ferry Road Chick-fil-A-branded restaurant on the date of the alleged incident. This could not be more clearly set forth than in the affidavit in the public record of Christopher M. Eckert, the sole member of 2CE, LLC, which operates the subject Chick-fil-A branded restaurant. He states in paragraphs 6 through 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 Eckert).

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).

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. Accordingly, Chick-fil-A, Inc. cannot be held vicariously liable and therefore the Circuit Court did not err in ruling that Chick-fil-A, Inc. should be substituted for 2CE, LLC.

Permitting the Appellant to pursue his causes of actions against the entity that actually controls the subject Chick-fil-A-branded restaurant is entirely appropriate, helpful to the Appellant, and a just outcome for Chick-fil-A, Inc., who is now dismissed, and 2CE, LLC who has the opportunity to defend the allegations of negligence made against it by the Appellant.

Accordingly, based on the aforementioned, the Circuit Court's Order substituting 2CE, LLC in the place of Chick-fil-A, Inc. is not controlled by an error of law, and has evidentiary support for its factual conclusions.

b. Substitution of 2CE, LLC in Place of Claire H. Eckert

Likewise, the Circuit Court's Order substituting 2CE, LLC in place of Claire H. Eckert is not controlled by any error of law. Further, there is evidentiary support for the Circuit Court's factual conclusions.

Appellant has asserted a single cause of action in his Complaint: Negligence. Based on the sole cause of action pled in his Complaint, the only proper parties in interest are the driver/employee Sasha N. Gray, and her employer 2CE, LLC (to the extent Appellant alleges vicarious liability). As articulated in the affidavit of Christopher Eckert, Sasha N. Gray was employed by 2CE, LLC on June 17, 2022, and 2CE, LLC—as the sole employer—was responsible for supervising and training its employees. (Affidavit of Christopher Eckert). Further, according to the affidavit testimony of Claire H. Eckert, Claire H. Eckert is not a member of 2CE, LLC and

did not train, supervise, direct, or manage any employees of 2CE, LLC, including its delivery drivers. (Affidavit of Claire H. Eckert).

Appellant has failed to cite any error of law in granting Respondents' Motion to Substitute. Further, the Order Granting the Motion to Substitute is supported by evidence, including the affidavit testimony of Christopher Eckert and Claire H. Eckert. Accordingly, this Court should affirm the Order Substituting 2CE, LLC in place of Claire H. Eckert.

II. Appellant's Argument Regarding the Circuit Court's Denial of Appellant's Motion(s) to Compel Is Not Properly Before the Court

Appellant contends the Circuit Court erred in denying Appellant's Motion to Compel Production of Documents and Things, Motions to Compel Respondents to Provide Complete Answers to Interrogatories and other Outside Agencies. Appellant's arguments are not properly before the Court.

On August 15, 2023, Appellant filed his Notice of Appeal, appealing "the order of the Honorable Maite Murphy dated, August 11, 2023." (Notice of Appeal) Attached to the Notice of Appeal is the Circuit Court August 11, 2023, Order on Respondents' Motion to Substitute. (*Id.*). The Order granting Respondents' Motion to Substitute is the only Order on Appeal.

There is no discovery order on appeal under Appellate Case No. 2023-001295. Accordingly, the argument regarding the Motion(s) to Compel is not properly before the Court.

While Respondents maintain there is no Appellate issue before the Court with regard to the Circuit Court's Orders on discovery, nevertheless, Respondents address the merits of Appellant's argument. "Discovery orders … are interlocutory and are not immediately appealable." *Hamm v. South Carolina Public Service Com'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994). The referenced decision by the Circuit Court related to interrogatories and requests for production

relate to discovery. Accordingly, Appellant has attempted to submit an improper interlocutory appeal.

III. There is No Preserved Issue for Appellate Review as It Relates to the Alleged Failure of Respondents to Serve Appellant with a Copy of the Proposed Order

Finally, Appellant contends that Respondents did not provide a copy of the proposed order submitted to the Court and he was, therefore, "disadvantaged." He also argues that he is "of belief that Judge Murphy did not consider Appellant's Affidavits and nothing in the Order to suggest that Appellant's evidence was considered."

As an initial matter, this matter was not raised to and ruled on by the circuit court and therefore 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."). Appellant did not file a Rule 59(e), SCRCP Motion with the Circuit Court to reconsider its Order and raise this issue. Appellant, therefore, cannot raise this issue for the first time on Appeal.

Although this matter is not preserved for appeal and should not be considered, Appellant's argument is undermined by the Circuit Court's record and order. Appellant contends that he was disadvantaged because he believes Judge Murphy did not consider the submissions of Plaintiff and nothing in the Order suggests that Appellant's evidence was considered. However, The Court's first paragraph states: "Following consideration of the motion **and other submitted documents and materials, along with oral arguments**, the Court GRANTS Defendants' Motion." (Order p.

1) (emphasis added). The Circuit Court's statement alone indicates that all materials submitted to the Court were reviewed and considered prior to the issuance of the Order.

In addition, the Circuit Court specifically stated at the hearing that the Circuit Court did not need anything from Appellant for the rulings:

> … 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.

(Trans. P. 23).

Further, on the record, as the Circuit Court was directing the parties on proposed Order(s), in response to whether Appellant needed to submit anything additional, the Court stated: "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." (Trans. P. 30). The Circuit Court's own direction on the record supports that all materials would be considered prior to the Court issuing a ruling and that the Circuit Court would make any changes she needed to based on the ruling.

Accordingly, the record is clear that the CIrcuit Court considered all materials submitted to it and that Appellant was not prejudiced. The Circuit Court did not abuse its discretion in not allowing Appellant to submit a Proposed Order.

CONCLUSION

Based on the aforementioned, the Circuit Court did not abuse its discretion in granting its Order Substituting 2CE, LLC in place of Chick-fil-A, Inc. and Claire H. Eckart. Accordingly, the Circuit Court's Order should be affirmed.

Respectfully submitted,

COLLINS & LACY, P.C.

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