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SC Court of Appeals

APPELLANT'S FIRST AMENDED BRIEF

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

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(B) <u>STATEMENT OF ISSUES ON APPEAL</u>

I. Did the Circuit Court Appropriately Deny Plaintiff's Motion to Amend Because it Would Prejudice Trident?

II. Did the Circuit Court Appropriately Deny Plaintiff's Motion to Amend/Substitute Due to the Futility of Said Motion?

   a. Did the Circuit Court Appropriately Decide Whether the Exclusivity Defense Bars Any Further Claim by Plaintiff Against Trident?

      i. Did the Circuit Court Appropriately Decide that the <u>Keene</u> Case does Not Alter Trident's Status as a Statutory Employer?

   b. Did the Circuit Court Appropriately Decide that Trident's Dismissal from a Workers' Compensation Act Claim Would Preclude Further Litigation in a Tort Law Claim?

   c. Pursuant to 15(C), S.C.R.C.P., Did the Circuit Court Appropriately Decide that the Statute of Limitations had Expired to Substitute Trident in as a "New Party" for John Doe?

(C) <u>STATEMENT OF THE CASE</u>

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, and received the Record of Appeal on February 19, 2024.

(D) STANDARD OF REVIEW

"The determination of whether a worker is a statutory employee is jurisdictional and, therefore, the question on appeal is one of law." Posey v. Proper Mold & Eng'g, Inc., 378 S.C. 210, 216, 661 S.E.2d 395, 398 (Ct. App. 2008) (citing Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999); Glass v. Dow Chem. Co., 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997)). "As a result, this court has the power and duty to review the entire record

and decide the jurisdictional facts in accord with its view of the preponderance of the evidence." Id. at 216, 661 S.E.2d at 399 (citing Harrell, 337 S.C. at 320, 523 S.E.2d at 769; Glass, 325 S.C. at 202, 482 S.E.2d at 51); see also Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 7-10, 132 S.E.2d 18, 20-22 (1963), overruled in part on other grounds, Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002) (holding the existence or absence of an employment relationship is a jurisdictional fact that the court must determine based on its review of all the evidence in the record). "Where the issue involves jurisdiction, the appellate court can take its own view of the preponderance of the evidence." Posey, 378 S.C. at 216-17, 661 S.E.2d at 399 (citing Nelson v. Yellow Cab Co., 349 S.C. 589, 594, 564 S.E.2d 110, 112 (2002)). "It is South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the [WCA]." Edens v. Bellini, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004).

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 [similar to a motion to dismiss under Rule 12(b)(6)].

Generally, a ruling on a motion to dismiss under Rule 12(b)(6), SCRCP [or it's equivalent], must be based solely on the allegations contained in the complaint. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." Jarrell v. Petoseed Co., 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998).

"In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court." Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005).

(E) ARGUMENT

I. The Circuit Court Inappropriately Denied Plaintiff's Motion to Amend Complaint and Substitute Defendant as Defendant Would Suffer No Prejudice if Plaintiff's Motion Was Granted.

As stated previously in Plaintiff's Motion to Amend Complaint and Substitute Defendant, Plaintiff would agree to a 40(j) dismissal of this claim in order to prevent Trident from being prejudiced. The only argument that Trident made with regards to prejudice at the Hearing was that Trident would be forced to try this case in two (2) months had the motion been granted then or would have to try this case without enough time to prepare its defense if this Appeal were granted now, this is clearly a non-issue.

II. The Circuit Court Incorrectly Denied Plaintiff's Motion to Amend/Substitute Due to the Alleged Futility of Said Motion.

a. The Circuit Court Incorrectly Decided that the Exclusivity Defense Barred Any Further Claim by Plaintiff Against Trident.

i. The Circuit Court Incorrectly Decided that the Keene Case does Not Alter Trident's Status as a Statutory Employer.

The Keene case specifically states that its decision applies to both 42-1-400 and 42-1-410, but more importantly, there are numerous decisions by South Carolina courts that state that the term "owner" as used in 42-1-400 is synonymous with "principal contractor." Murray v. Aaron Mizell Trucking Co. (S.C.App. 1985) 286 S.C. 351, 334 S.E.2d 128; Fortner v. Thomas M. Evans Const. and Development, LLC (S.C.App. 2013) 402 S.C. 421, 741 S.E.2d 538; Marchbanks v. Duke Power Co. (1939) 190 SC 336, 2 SE 2d 825; Kennerly v. Ocmulgee Lumber Co. (1945) 206 SC 481, 34 SE2d 292. Therefore, Trident falls under 42-1-400, which is admitted by Defendant, does not fall within the purview of the three part test. Even if it were determined to fall under the purview of 42-1-410, all case law states the exact same test applies. See e.g. Collins v. Charlotte, 400 S.C. 50 (S.C. Ct. App. 2012), 732 S.E.2d 630.

b. The Circuit Court Incorrectly Decided that Trident's Dismissal from a Workers' Compensation Act Claim Would Preclude Further Litigation in a Tort Law Claim.

The Consent Order proffered by Defendants as Exhibit A to their Proposed Intervenor's Memorandum in Support of its Motion to Intervene and in Opposition to Plaintiff's Motion to Amend states that "The South Carolina Workers' Compensation Commission has jurisdiction over the parties and subject matter of this claim," and that "The parties agree to dismiss with prejudice Defendants Trident Construction, LLC, and New Hampshire Insurance Company c/o Gallagher Basset Services, Inc., from the claim with prejudice, pursuant to S.C. Code § 42-1-415(A) and S.C. Reg. 67-415." Each of these codes/regulations deals exclusively with the Workers' Compensation Act, meaning that it would have no bearing whatsoever on further litigation in a tort law claim, which is what is being pursued here. Defense's arguments are moot in this respect.

c. Pursuant to 15(C), S.C.R.C.P., the Circuit Court Incorrectly Decided that the Statute of Limitations had Expired so as to Substitute Trident in as a "New Party" for John Doe.

The only case applicable to this Appeal cited by Defendant is Hughes v. Water World Water Slide, Inc., 314 S.C. 211 S.C. 211, 214, 442 S.E.2d 584, 586 (1994), which sets forth how a claim against a new party can relate back to the date of the original complaint if all four (4) elements are satisfied under Rule 15(C), S.C.R.C.P. The other two (2) cases cited by Defendant are Jackson v. Doe, 342 S.C. 554, 558-59 (2000), which has to do with adding as opposed to substituting a party, and Land v. Green Tree Servicing, LLC, 140 F. Supp. 3d 539, 546 (D.S.C. 2015), a Maryland case which mainly considers equitable tolling and additionally deals with Federal (not South Carolina) state law.

Additionally, included herein by reference (verbatim) are all arguments (including case citations) made in Plaintiff's Memorandum in Support of Plaintiff's Motion to Amend Complaint and Substitute Defendant.

Plaintiff satisfied the four (4) elements to relate the claim back to the date of the original complaint against the "new party" (Trident) because (i) the claim against the new party arises out of the conduct set forth in the original pleading; (ii) the new party received notice of the action such that it will not be prejudiced in defending the claim on the merits; (iii) the new party knew or should have known that, but for a mistake concerning the new party's identity, the new party would have been added when the original complaint was filed, and; (iv) requirements ii and iii were fulfilled before expiration of the statute of limitations (as explained in Plaintiff's Memorandum in Support of Plaintiff's Motion to Amend Complaint and Substitute Defendant.

F. CONCLUSION

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 should be overturned.

03/21/2024

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