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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely

Josh Hawkins .....Appellant,

v.

American Airlines .....Respondent.

Appellate Case No. 2020-001150

REPLY TO APPELLEES' RETURNS TO PETITION FOR REHEARING

Pursuant to SCACR Rule 221(a), the appellant has respectfully moved for rehearing or *en banc* review so the ruling of the Court of Appeals may be corrected to adhere to existing law, or in the alternative, so the ruling may be clarified. The appellant has argued that Court of Appeals' ruling conflicts with the law because it is essentially a rubber stamp of a lower court order that adopted American Airlines' and Expedia's self-serving, legally flawed arguments. Notwithstanding, the appellees have filed returns, arguing that the appellant has not pointed out a reason for rehearing. Pursuant to SCACR 221(a), "[n]o return to a petition for rehearing may be filed unless requested by the appellate court." Since the appellees have filed returns, the appellant respectfully files this reply pursuant to SCACR 240(f).

Reply to American Airlines' Return

I. The lower court's dismissal was without prejudice.

American Airlines has confused pointing out overlooked issues and errors with citing case law. In his Petition, the appellant pointed out, with particularity, that the Court of Appeals should clarify its order to acknowledge that the appellant may bring claims 1) pursuant to the Montreal Convention and other claims not part of this appeal as to American Airlines and 2) litigate claims in Magistrate Court as to Expedia. As pointed out in the appellant's Petition for Rehearing, the appellees have taken the untenable position that the Court of Appeals' opinion means claims that have never been litigated never can be litigated. That is not in the Court of Appeals' opinion, and it is not the law.

American has argued in open court that the appellant may have a trial against American in court, just not pursuant to the causes of action brought in the Court of Common Pleas, which are the subject of this appeal. Now, American has changed its position, but its position conflicts with the law. "When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice." *Spence v. Spence*, 628 S.E.2d 869 (2006). (See also *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986); *Hennegan v. Atlantic Coast Line R. Co.*, 211 S.C. 357, 45 S.E.2d 331 (1947): "Dismissal of a complaint does not bar a subsequent action brought before expiration of the statute of limitations if the dismissal is based merely on the insufficiency of the complaint.")

Nowhere in the lower court's order, which was properly appealed and is part of the Record on Appeal, is there any indication of an intent to deviate from the rule in *Spence*, and from many other cases, that a dismissal pursuant to SCRCP 12(b)(6) is without prejudice. The order simply states that action was dismissed, it is undisputed that American Airlines' motion was brought pursuant to SCRCP 12(b)(6), and the Court of Appeals did not rule that the dismissal was with prejudice.

II. The appellees partially created the need for clarification.

It should not be contested that an appellant may litigate claims that have not been litigated. Even though American Airlines has acknowledged in open court that the appellant may bring a claim under the Montreal Convention[1], American Airlines has now changed its position, and argues that the lower court's dismissal was somehow *with* prejudice, notwithstanding the rule in *Spence*. Additionally, American Airlines simultaneously argues that the appellant seeks an advisory opinion, notwithstanding the fact that it created the issue by taking its changing and flawed position after the Court of Appeals issued its ruling. It should be a given that the appellant may move forward with the action pending in Magistrate Court because the claims have never been litigated and have never been disposed of. It is only because the appellees took a position that conflicts with the law that the appellant seeks clarification on the issue. Otherwise, if the Magistrate Court dismisses the action pursuant to American Airlines' flawed argument, it could result in the parties going back through the appellate process unnecessarily, only to have this Court eventually issue a ruling consistent with *Spence* and the other cases cited herein.

III. It is uncontested that the Montreal Convention provides a different cause of action than those pled in the lower court.

American Airlines has argued, up until recently, that the appellant's proper claim is a Montreal Convention claim. The appellant therefore brought that claim in the Magistrate Court. American moved to have the Magistrate Court dismiss the case because of this appeal, and the Magistrate Court denied that motion. The appellees argued that if this Court overturned the lower court's decision, than the Magistrate Court action would be duplicative. The Magistrate Court therefore

[1] The appellant also has claims under the Airline Deregulation Act and other established law governing airlines and airline conduct and business.

stayed the action so that it could move forward at the appropriate time if necessary. Now that the Court of Appeals has affirmed the dismissal, it should not be contested that the stayed action, which includes the Montreal Claim that American argued was the appropriate claim, may move forward.

American Airlines relies on *Plum Creek Development Co. v. City of Conway*, 328 S.C. 347, 351, 491 S.E.2d 692, 695 (Ct. App. 1997) to support its new position, but misreads that case. In *Plum Creek Development* our Supreme Court held that in order "[t]o establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Of course, the third and crucial element is missing here because a dismissal pursuant to SCRCP 12(b)(6) "is in nature of discontinuance of action and is not an adjudication on the merits." *Spence v. Spence*, 628 S.E.2d 869 (2006).

American Airlines also argues that causes of action have been split, which is not true. The appellant filed state law causes of action, which the lower court dismissed without prejudice, finding that federal law (the Montreal Convention) preempted the unlitigated state law causes of action. The Montreal Convention was then filed, for the first time. The claim has never been split and was filed in accordance with the lower court's ruling, American Airlines' argument as to how the appellant should proceed, and now, this Court's affirmation of the dismissal without prejudice. The appellant's Montreal Convention cause of action was never filed before that and has never been split.

Reply to Expedia's Return

Expedia also sought dismissal pursuant to SCRCP 12(b)(6), and the lower court granted the dismissal. No claims against Expedia have been litigated on their merits, and the lower court's

order explicitly states that the appellant "is free to bring these claims…on an individual basis in the South Carolina Magistrate's Court." Expedia has never challenged that ruling on appeal. See *Renaissance Enterprises, Inc. v. Summit Teleservices, Inc*., 334 S.C. 649. 652 (1999) and *Herron v. Century BMW*, 387 S.C. 525 (2010). Expedia cannot genuinely claim that the appellant cannot litigate his claims in Magistrate Court when Expedia argued for that relief below, got the relief it requested, and then had the order granting that relief affirmed by the Court of Appeals. Expedia does admit that the Court of Appeals decision does not deprive the Magistrate Court of jurisdiction, but then argues that "the decision may end or limit" the claims. Those two statements are, of course, inconsistent. The merits of the claims against Expedia have never been litigated, Expedia's terms explicitly stated that the claims may be litigated in Magistrate Court, and this Court has affirmed the lower court's order explicitly stating the appellant may bring the claims in Magistrate Court.

Conclusion

The appellant respectfully requests that the Court of Appeals clarify its ruling to establish that, pursuant to existing law, the dismissal of the appellants' claims is without prejudice and that the appellant may move forward with his claims in Magistrate Court as to American Airlines and as to Expedia.

Respectfully submitted,

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May 13, 2024

Certificate of Service

I, the undersigned, affirm that the foregoing **Reply to Appellees' Returns to Petition for Rehearing** was served on William Freeman, John Cants, and Kenneth S. Nankin, attorneys for defendants American Airlines, by the CM/ECF system on May 13, 2024.

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