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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Kirk Griffin, Circuit Court Judge

Appellate Case No.: 2024-000742

Jerry Cozby — Plaintiff,

vs.

Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Ouellette, and Quality Haulers, Inc. — Defendants,
of which,
Kent Huntley Oliver and Thompson Construction Group, Inc. are — Respondents,

AND

Dean Alan Arender and Tamala Arender, — Appellants,

vs

Kent Huntley Oliver, Thompson Construction Group, Inc. Curtis Kent Ouellette, and DMX Transportation Services, Inc. — Defendants,
of which
Kent Huntley Oliver and Thompson Construction Group, Inc. are — Respondents,

AND

Kent Huntley Oliver, — Respondent,

vs.

Curtis Kent Ouellette, Quality Haulers, Inc., Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc., Defendants, — Defendants,
of which
Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc. are — Appellants,

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Return

Dean Alan Arender and Tamala Arender, oppose Respondents Kent Huntley Oliver and Thompson Construction Group, Inc.'s (hereinafter, collectively, "the Thompson Defendants")

motion to dismiss the present appeal and file, by and through their undersigned counsel, this Return pursuant to Rule 240(e), SCACR, in opposition to that motion. For the reasons stated herein, and those stated within any return filed by counsel for Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc., Appellants Dean Alan Arender (hereinafter "Arender" or "Appellant") and Tamala Arender (hereinafter, collectively, "the Arenders" or "Appellants") respectfully request the Court deny the Thompson Defendants' Motion to Dismiss.

Background

This appeal arises from the circuit court's granting the Thompson Defendants' motion to compel joinder and consolidation of three actions pursuant to Rule 20, SCRCP, without the consent or approval of Arenders, who are the Plaintiffs in one of the three actions. The three suits arise from a multivehicle collision that occurred in Newberry County on November 12, 2020. The Arenders filed suit in Newberry County against the Thompson Defendants, Curtis Ouellette; Quality Haulers, Inc., and DMX Transportation Services ("the Arender Action"). Pursuant to Rule 20, SCRCP, the Arenders elected to join in one action as plaintiffs. Kent Oliver, one of the Thompson Defendants who moved to have these actions joined and consolidated in Sumter, likewise filed his suit Newberry County against Curtis Ouellette, Quality Haulers, Inc., Arender, U.S. XPRESS Leasing, Inc. and U.S. XPRESS, Inc. ("the Oliver Action"). In the third case, Jerry Cozby filed suit against the Oliver and the Thompson Defendants, Curtis Ouellette, and Quality Haulers, Inc. in Sumter County ("the Cozby action").

In August of 2023, the Thompson Defendants filed a motion to join and consolidate the actions in Sumter pursuant to Rules 20 and 42, SCRCP. The Arenders, U.S. XPRESS Leasing, Inc., and U.S. XPRESS, Inc. opposed consolidation and joinder of the three actions.[1] After

[1] The Arenders do not oppose consolidation for discovery purposes, but they oppose the compulsory joinder of the actions and oppose the actions being consolidated for trial.

briefing the matter, the circuit court heard arguments on the Thompson Defendants' motion on October 9, 2023. The court granted that motion on February 13, 2024. Appellants' motion to reconsider was timely filed and denied on April 4, 2024. This appeal followed. U.S. XPRESS, Inc., U.S. XPRESS Leasing, Inc., and Arender in his capacity as a Defendant in the Oliver action, filed an appeal on the same grounds at the same time. The Court consolidated the appeals on May 16, 2024. On May 28, 2024, the Thompson Defendants moved to dismiss the appeal as interlocutory.

Argument

I. Standards for Appealability

Pursuant to S.C. Code Ann. section 14-3-330, the appellate courts have jurisdiction in actions at law and shall review those action upon appeal following:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas . . . ;
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330. Stated summarily, section 14-3-330 provides for the appeal of final orders, interlocutory orders that involve the merits, interlocutory order affecting a substantial right of the appellant, and other specific scenarios detailed in subsections (3) and (4), which are inapplicable to the present action. The Arenders do not allege the order is a final order but argue it is an immediately appealable intermediate order, as it affects merits and affects substantial rights of the appellants. Section 14-3-330(1) and (2) are not mutually exclusive; the order is

immediately appealable if it falls within one or both. *See Link v. School Dist. Of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d 176, 178 (1990).

An order "involving the merits" is one that "finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense" and is immediately appealable. *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993). Interlocutory orders are likewise immediately appealable when they affect a substantial right and that right cannot be vindicated on appeal after the end of the case, and interlocutory orders are immediately appealable when they affect the mode of trial of trial. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 475 (Ct. App. 2011). Appeal of an order that affects the mode of trial is, or may be, waived if not immediately appealed. *Shah v. Richland Mem'l Hosp.*, 350 S.C. 139, 564 S.E.2d 681 (Ct. App. 2002).

In assessing the immediate appealability of this order, an assessment of the merits and the effect of the order becomes necessary. This is not a case where an appeal is filed following the grant or denial of a routine motion. This is not a case where an appeal is filed following the grant or denial of a proper, but rare or novel motion. This case involves the grant of a motion based upon wholly improper procedure. As a direct consequence, there is no case law addressing the immediate appealability of an order of similar nature. Indeed, counsel has been unable to even find an order, appealed or unappealed, or a motion, granted or denied, of like kind and premised upon Rule 20, SCRCP. Therefore, an assessment of the merits or effects of the order is required. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015) (holding appellate review is not "constrained by how the order is styled," noting "appellate court[s] should look to the effect of an interlocutory order to determine

its appealability," and concluding the appellate courts are "free to evaluate [a] trial court's order as what it is—note merely what it appears to be.").

II. Merits of Appeal and Effect of the Order

The Thompson Defendants moved for consolidation and joinder of the Cozby action, the Arender action, and the Oliver action around the Cozby action in Sumter County.[2] At oral arguments, counsel for the Thompson Defendants acknowledged that actions cannot be both consolidated and joined, and thereafter asked only for joinder under Rule 20(a), SCRCP, but continued to rely upon the factors controlling consolidation. (Ex. 1, p. 10 (counsel for the Thompson Defendants, "All we're doing is trying to consolidate all the parties around one another."); p. 34 (counsel for the Thompson Defendants, "I think I'm asking the court we filed for consolidation and joinder. I'm asking the Court for joinder. Because that takes care of any venue issues here."); p. 37 (counsel for the Thompson Defendants, "Now the question is; is there – is there an appropriate venue here in Sumter? And there is, if the court consolidates it here, I still don't understand why they don't want the case here in Sumter.")). The court ruled on the joinder motion only, acknowledging the Thompson Defendants abandoned their arguments for consolidation. The order, nonetheless, assessed the motion under standards applicable to motions to consolidate and conflates, at the direction of the Thompson Defendants, the requirements for joinder and the requirements for consolidation and under Rule 42(a), SCRCP. (Ex. 2, p. 10 ("Joinder is desirable for the parties and the court."); p. 11 ("The Court agrees with Thomson that joinder for both discovery and trial is justified under the circumstances presented

[2] Based upon the Thompson Defendant's briefing, they intend to join a fourth action—a property damage arbitration—after it is appealed to the circuit court. That action, case number 2023-CP-36-00125, was filed by Great West Casualty Company, as subrogee of U.S. Xpress, Inc., against Kent Huntly Oliver and Thompson Construction Group. In the Thompson Defendants' motion, they "specifically reserved the right to join and consolidate the Great West Action . . . after any appeal of the arbitrator's decision." (Ex. 3 p. 3).

in these cases. Plainly it will be less burdensome for all parties and the Court to join these proceedings. Joinder will reduce the cost to the parties, conserve judicial resources…."); p. 12 ("the court finds the benefits of joinder outweigh any concerns associated with a single trial.")).

Consolidation is a discretionary matter for the court to decide only after the moving party has met their burden. *See Keels v. Pierce*, 315 S.C. 339, 343, 433 S.E.2d 902, 904 (1993). The same is not true for compelling joinder. The order concludes that joinder "would prevent duplicative litigation, save the parties from incurring unnecessary costs, and conserve judicial resources." (Ex. 2 p. 10). In a motion for consolidation of cases, "the moving party has the burden of persuading the court that consolidation is desirable." *See Keels v. Pierce*, 315 S.C. 339, 342 (Ct. App. 1993) (citing *Prudential Insurance Co. v. Marine National Exchange Bank*, 55 F.R.D. 436 (E.D. Wis. 1972)). However, "general considerations of efficiency or convenience of parties or witnesses do not require joinder under rule 19." James F. Flanagan, *South Carolina Civil Procedure* 160 (3d ed. 2010).

While the Arenders contest and intend to raise several discrepancies on appeal, the crux of their argument is that Rule 20, SCRCP, is a wholly inappropriate vessel to effectuate the Thompson Defendants' desires. In essence, the Thompson Defendants moved for, and the court granted, an order allowing the Thompson Defendants to compel joinder because "the requirements of Rule 20(a) are satisfied, and the [c]ourt may exercise its discretion to join these cases." The Thompson Defendants and the court argue joinder under Rule 20 is permissive and therefore may be compelled by the court upon the motion of a Defendant. Such argument is incorrect and has no basis in the Rules of Civil Procedure or the law. The inappropriateness of the motion and order is the reason why no appellate cases address the immediate appealability of an order granting or denying a defendant's motion to join multiple actions in a different venue.

Rule 20, SCRCP, permits plaintiffs to join in one action when they assert rights arising from the same transaction or occurrence and a common question or law or fact will arise in the action. Rule 20(a), SCRCP. Likewise, a plaintiff may join more than one defendant in the same action, when common questions arise, or the matter arises from the same transaction or occurrence. *Id.* Rule 20, SCRCP, provides no mechanism for the court to compel the joinder of parties or the joinder of whole actions and provides no mechanism for a Defendant to move for joinder.

Joinder may be "compelled only if the strict requirements of Rule 19 are met." Flanagan, *supra*, at 168. When those strict requirements are not met, the plaintiff may choose which plaintiffs may join her suit and may choose her defendant, so long as the transaction or occurrence and common question requirements are met. "Ordinarily, the defendant cannot force another joint tortfeasor into the litigation." *Id.* "In rare circumstances, others must be joined because Rule 19 requires the presence of a particular person for complete resolution of the matter." *Id.* If a defendant wishes to join other parties despite the objection of a plaintiff, "Rule 22 Interpleader, and Rule 24 Intervention, may be used to join other parties over the plaintiff's objection." *Id.* at 169. Rule 20 does not permit a defendant or the court to compel the joinder of plaintiffs, defendants, or actions.

The circuit court acknowledged the Arender's argument that Rule 20 cannot be used to compel joinder and that joinder is only compelled under Rule 19, but dismissed it, stating that Rule 20's permissiveness gives the court discretion to allow or refuse joinder. As a general statement of law, that is correct, but only as to joinder proposed by a plaintiff. Rule 20 does not give the court discretion to join plaintiffs, defendants, or actions upon a motion by a defendant or *sua sponte*. The court, in its discretion, may deny a plaintiff's motion to join additional parties,

but it may not use its discretion pursuant to Rule 20, SCRCP to allow a defendant to join plaintiffs, defendants, or actions. The circuit court, therefore, adopted a wholly incorrect procedure for joining the three actions. That error necessitates immediate review.

Further complicating matters, the order fails to comply with the requirements of Rule 20(a), SCRCP. When the court orders joinder, the parties and pleadings are merged, and "all persons are joined in *one action*." Rule 20(a), SCRCP (emphasis added). South Carolina Rule of Civil Procedure 20(a) provides:

> All persons may **join in one action as plaintiffs** if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be **joined in one action as defendants** if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Rule 20(a), SCRCP (emphasis added). However, this is not a situation where persons are simply joining as plaintiffs or defendants, as is evidenced by the case caption. (Ex. 2 p. 1). The caption shows three separate actions as if they were consolidated; the only difference now is that there is only one case number. Ascertaining how the various claims work together in one action proves difficult. Without a clear understanding of how persons were joined as plaintiffs or defendants, the parties lack an understanding of how their claims are proceeding. The order, including the caption, fails to address how the parties are aligned. Therefore, the order either failed to join all plaintiffs and all defendants in one action, or it has so joined them—but failed to state as much—and forces plaintiffs to sue defendants they did not wish to sue. In the latter situation, Cozby, Arender, and Oliver each have been forced into litigation that violates the exclusivity provision

of the workers' compensation act, by forcing them to assert claims against their employers, claims that are not viable. *Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 407, 608 S.E.2d 425, 427 (2005) (holding a "third-party defendant and the employer are not joint tortfeasors" and holding "there can be no right of contribution" between the employer and third-party defendant). The effects of the order the necessity of an intermediate appeal. The Arenders respectfully request the Court deny the Thompson Defendants' motion to dismiss.

III. The Order Compelling Joinder Under Rule 20, SCRCP, is Immediately Appealable.

The order compelling joinder pursuant to Rule 20, SCRCP, is immediately appealable. Because Rule 20, SCRCP, cannot be used to effectuate the goals of the Thompson Defendants and the order is premised upon improper procedure, there is no appellate opinion directly addressing the immediate appealability of a grant of a defendant's motion to join additional parties pursuant to Rule 20, SCRCP. However, there are opinions addressing the immediate appealability of orders that effect the same or similar results, but they are premised upon different or past rules, rules that would, procedurally, make the motion proper, even if substantively flawed.

The supreme court addressed a similar issue in 1946, after a trial court allowed the sole defendant to join as a party defendants the entity and individual the named defendant believed were responsible for the harms alleged in the complaint. *Simon v. Strock*, 209 S.C. 134, 138, 39 S.E.2d 209, 210 (1946). The defendant did not allege that he, the joined individual, and the joined entity were joint tortfeasors; instead he alleged that he committed no tort and sought to join the entity and individual he thought were responsible for them harms. *Id.* at 139, 39 S.E.2d at 211. The plaintiff filed an immediate, interlocutory appeal. *Id.* at 138, 39 S.E.2d at 210. The supreme court heard the appeal and reversed, finding "[i]t is well established in this jurisdiction

that one who is injured by the wrongful act of two or more joint tortfeasors has an election or option to sue each of such tortfeasors separately or to join them as party defendants in a single action." *Id.* at 138-39, 39 S.E.2d at 211. The court specified "[t]he election or option [of who to join] is given to the Plaintiff and not the defendant." *Id.* at 139, 39 S.E.2d at 211.

The *Simon* court went on to explain that whether considering joint tortfeasors or distinct defendants, "the plaintiff has the choice of designating the party who she claims committed the tort alleged in the complaint." *Id.* A plaintiff "should not be required to sue someone against whom she makes no claim." *Id.* If a defendant were permitted to designate additional parties, it "would allow a defendant to select in part those to be sued and would force the plaintiff into uncontemplated and perhaps undesired litigation with every added defendant." *Id.* Because the trial court's decision to allow a defendant join other parties had "the effect of overriding repeatedly declared legal right and revoking well recognized procedure," the court reversed the order on an intermediate appeal "in order to expedite the final determination of this litigation."[3] *Id.* Likewise, in the present action the order impacts the Arenders' well-recognized and substantial right to elect their co-plaintiff and elect their defendants and directly impacts the merits of the action; the order must be immediately reviewed.

The *Simon* case predates the current rules of civil procedure, but its conclusion "[t]o allow a defendant, against the consent of the plaintiff, to bring in other joint tort-feasors would be an interference with the well-recognized right of the plaintiff" remains valid. *Id.; Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017) (citing *Simon* in 2017 in support of the proposition

[3] Coincidentally, the *Simon* court also noted that in addition to the joinder violating the "repeatedly declared legal rights" of the plaintiff "and revoking well established procedure," that one of the joined parties was improperly joined because it had "paid the award made by the [workers' compensation commission] to the dependents of the deceased [and had] been expressly relieved of any common law liability by the provisions of the [Workers'] Compensation Act." *Simon*, 209 S.C. at 140, 39 S.E.2d at 211-12; *see also, supra*, pp. 8-9.

that a plaintiff has the election or option to join parties in a single action, not the defendant, and concluding "the right of the plaintiff to choose her defendant has been recognized in South Carolina jurisprudence for almost two hundred years.").

Smith does not address joinder pursuant to Rule 20, SCRCP, but it is similarly instructive as to the issues currently before the Court, in addition to it validating the holdings in *Simon* in the modern day. *Smith*, 419 S.C. at 584, 799 S.E.2d 479. In *Smith*, a defendant sought to join as a defendant a joint tortfeasor who settled prior to the initiation of the suit. *Smith*, 419 S.C. at 554, 799 S.E.2d at 482. The defendant did not make that motion under Rule 20, SCRCP, like the Thompson Defendants did in this case, instead the defendant brought a third-party claim against the settling tortfeasor under Rule 14, SCRCP, and argued the settling tortfeasor was a necessary party, such that the defendant could compel joinder pursuant to Rule 19, SCRCP. *Id.* The supreme court ruled the settling tortfeasor could not be joined under either theory—a holding relevant to the substance of the present appeal—but most importantly for the present motion, the court held the appeal could proceed immediately in its interlocutory status. *Id.* at 553-55, 799 S.E.2d at 481-83. The court noted the appellants also appealed a discovery order, but declined to address that issue, as it was not sufficiently connected to the companion issues, those raised by Rules 14 and 19, SCRCP, but specified the companion issues were "proper for review." *Id.* at 552, n.1, 799 S.E.2d 479 at 481, n.1.

Correspondingly, in *Neeltec Enters. Inc. v. Long*, the supreme court held an appeal of an order in which a trial court grants a defendant's motion to have himself substituted by two different defendants is immediately appealable. *Neeltec Enters., Inc. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012). In that case, the court held the right of the plaintiff to choose her defendant is a substantial right within the meaning of section 14-3-330. *Id.*

In *Morrow v. Fundamental Long-Term Care Holdings, LLC*, the supreme court similarly held a circuit court order was immediately appealable when the order forced the plaintiff to prevail against one defendant as a predicate to pursing the claim against a second defendant. 412 S.C. 534, 773 S.E.2d 144 (2015). The court concluded the order was immediately appealable, because "[t]he effect of the order is to prevent the [plaintiffs] from being architects of their own complaint and deprives them of bringing their case against a defendant of their own choosing." *Id.* at 539, 773 S.E.2d at 146. Furthermore, the court affirmed a plaintiff's right to choose the parties in the action is a substantial right as contemplated in section 14-3-330. *Id.* The court rejected arguments that the appealability of the order should be controlled by what the order "appears to be" and should be evaluated in light of "what it is" and in light of its effect. *Id.* at 540, 733 S.E.2d at 146.

While no mandatory authority addresses the appealability of an order granting defendants' motion to join multiple actions and multiple parties in a new venue, because the order is premised upon improper procedure, the foregoing cases are instructive when the effect of the order is considered, as contemplated in *Morrow*. *Id.* Although the order frames itself as a simple discretionary grant of a Rule 20, SCRCP, motion to join additional parties and consolidate multiple actions in a new venue, its effect is much greater. Consideration of the effect necessarily must begin with an acknowledgment that Rule 20, SCRCP, does not permit a defendant to join additional defendants and plaintiffs when it is not itself a plaintiff by virtue of a crossclaim or counterclaim. The Thompson Defendants asserted no such claims in the Cozby action and, therefore, cannot join parties unilaterally under Rule 20. With that predicate framework established, this appeal is not one involving a simple grant or denial of a plaintiff's motion to join additional parties, but rather is akin to *Simon*, *Smith*, *Neeltec*, and *Morrow*.

Those cases establish that the Arenders have a "repeatedly declared legal right" to join with Plaintiffs of their choosing and pursue their causes of action against the Defendants of their choosing. *Simon*, 209 S.C. at 139, 39 S.E.2d 211. That legal right "has been recognized in South Carolina jurisprudence for almost two hundred years" and the supreme court "unanimously reaffirmed—[in 2010]—the well-established right of the Plaintiff to choose which co-tortfeasor(s) she will sue." *Smith*, 419 S.C. at 563-64, 799 S.E.2d at 487-88. Moreover, the Arenders' legal right to elect co-plaintiffs and defendants "is a substantial right within the meaning of [section 14-3-330(2)]." *Neeltec*, 397 S.C. at 566, 725 S.E.2d at 928; *cf. Chester v. South Carolina Dep't of Pub. Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010) (recognizing that an order requiring a plaintiff join parties as defendants when the requirements of Rule 19, SCRCP, are not met violates the plaintiff's common law right to choose her defendant). Finally, the "effect of this order is to prevent the [Arenders] from being architects of their own complaint," the effect "deprives them of bringing their case against the defendant of their own chooses," the effect forces them to pursue claims in violation of the workers' compensation act's exclusivity provision, and the effect deprives the Arenders of a "substantial right within the meaning of section 14-3-330(a)." *Morrow*, 412 S.C. at 539, 773 S.E.2d at 146. To prevent the Arenders from appealing the order immediately would limit their appellate remedies and would thwart South Carolina's strong public policy favoring the settlement of disputes. *E.g.*, *Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888 (1987). "Just because part of the prejudice stemming from the order may be cured at a later date does not remove it from the purview of section 14-3-330 (2)." *Morrow*, 412 S.C. at 539 n.2, 773 S.E.2d at 147 n.2.

Moreover, the arguments put forward by the moving Respondents in favor of dismissing this appeal are flawed. Respondents equate the joinder and consolidation of these actions to an

order bifurcating trial into distinct phases and conclude, erroneously, that bifurcation orders are never immediately appealable. In so arguing, the Respondents rely upon the 2000 opinion of *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000), but fail address the supreme court's 2015 holding in *Morrow*, where an order styled as one for bifurcation was found to be immediately appealable, even though it stood to prevent the trial of all issues in a single proceeding. *Morrow*, 412 S.C. at 539, 773 S.E.2d at 146.

Respondents' reliance upon *Breland v. Love Chevrolet Olds, Inc.* is likewise flawed. 339 S.C. 89, 529 S.E.2d 11 (2000). Appellants do content, among various other issues, that the order of the court is a functional grant of an improper venue change, an argument rejected by Respondents. While it is telling Respondents rely upon *Breland* to establish that an order transferring venue is not immediately appealable, while arguing before the circuit court that this is not a venue transfer issue, *Breland* is inapplicable, as the joinder and consolidation of multiple actions and parties is distinctly different than a venue transfer, even if venue transfer was the, or an, ultimate goal driving Respondents' motion. (Ex. 1, Transcript p. 14 ("There is no – there's no dispute that we are in. That Newberry is – is appropriate. Its just that we want to be here in Sumter County, and we have a substantial right").

Moreover, Defendants erroneously equate the present order to one involving intervention. Intervention, controlled by Rule 24, SCRCP, was never cited in support of Respondents' motion, nor did the circuit court rely upon Rule 24, SCRCP. Intervention is markedly different from joinder and consolidation. When intervening, a nonparty asserts a right to join or requests to join an action. No such party is involved in the present case. The Respondents did not ask to intervene in these actions; they were parties already. Here, the court forced existing parties to assert claims against parties they did not wish to be defendants, in a forum they did not select,

and in a joined and consolidated action. The appealability of an order granting intervention has no relevance to this action.

In *Morrow*, the supreme court allowed the appeal to proceed, in part, because the circuit court misapprehended the nature of the plaintiffs' claims. *Morrow*, 412 S.C. at 538, 773 S.E.2d at 146. The circuit court in the action at bar misapprehended the applicability of Rule 20, SCRCP, and its separate and distinctness from consolidation. Even if the appellate courts had identified orders granting joinder under Rule 20, SCRCP, as orders not immediately appealable, the circuit court's misapprehension of the improper procedure applied in this case necessitates immediate appeal.

Conclusion

For these reasons, the Arenders respectfully request the Court deny the Respondents' motion to dismiss the appeal, so the errors raised in the appeal may be promptly and efficiently corrected.

Smith, Born, Leventis, Taylor, & Vega LLC

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June 13, 2024

Ex. 1

STATE OF SOUTH CAROLINA) SOUTH CAROLINA CIRCUIT COURT 3
COUNTY OF SUMTER) DOCKET NO. 2022-CP-43-01006

JERRY COZBY,)
Plaintiff,)
versus)
)
THOMPSON CONSTRUCTION,)
Defendant.)

H E A R I N G
BEFORE THE HONORABLE R. KIRK GRIFFIN

DATE: October 9, 2023
TIME: 9:45 a.m.
LOCATION: South Carolina Circuit Court 3

TRANSCRIBED BY: Natasha Barrientos

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INDEX

Proceedings..... 4
Certificate of Transcriber..... 42

EXHIBITS

(None marked)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

THE COURT: All right. The next matter, Mr. Smith, is that, the Cozby matter.

MR. SMITH: We got a lot of attorneys here.

THE COURT: Yes, sir.

MR. SMITH: (Inaudible) get settled. We draw party to this motion.

THE COURT: All right. This is Cozby versus Oliver, et al. Case number 2022-CP-43-01006. And this is defendant Thompson? That's correct, Mr. Smith? Defendant Thompson Construction Group's motion to consolidate?

MR. SMITH: Yes, sir.

THE COURT: All right.

MR. SMITH: And, Judge, just to consolidate and joinder, and I'll talk through why we think joinder's a more appropriate action. But just for -- for purpose of this right now, Judge, I represent Kent Oliver and Thompson Construction Group, which is sued by Mr. Cozby.

And that's one of -- of three other suits that are currently pending. One's an arbitration panel, and I'll talk about that in a second. But there's a number of other actions. Those actions have been filed in Newberry County. This is -- this accident happened on November 12, 2020 at I-26 in Newberry County. There was a horrific wreck. Don't want to get into the whole lot of the facts of it. Not --

not really relevant to the case, but there was heavy fog that morning. There's a lot of concern.

Mr. Oliver was traveling from Spartanburg, where he lived on the way to work here in Sumter, got in this wreck. Obviously, he takes the position, and he -- and that he was not at fault this accident, that the other defendants were at fault.

Mr. Cozby here is just someone who was driving through that -- through the interstate and claims something hit his car and caused him to have a wreck, and he became injured as a result. So Mr. Cozby really has -- is not one of the defendants, not one of a defendant named in any other suit. Rest of them are all defendants that are named in a lawsuit.

Judge, we're asking that you join and consolidate these cases around Mr. Cozby's action. We are the first one that got sued. This is the oldest case. This case has been pending here in Sumter County. And so that's one reason that we're here today.

Judge, as I told you; you have Jerry Cozby, who is the plaintiff in this case, also in this is Curtis Eluate(ph), and then there is Kent Oliver(ph), who is -- who is my client in this case, as well as Thompson Construction and Dean Orinda(ph), who is -- who was driving another truck.

Just for the court's awareness, Mr. Eluate was driving for Quality Haulers and there's some other -- some other

company that's named in one of these lawsuits with him. Mr. Oliver was driving for Thompson Construction within the course and scope of his employment. Mr. Orinda was driving for US Xpress. And so that gave rise to these four lawsuits, Judge.

And -- and, you know, I -- I told you about the Cozby lawsuit Orinda -- Mr. Orinda has sued Mr. Oliver and Thompson Construction Group, Mr. Eluate Quality Haulers and DMX Transportation, and that's pending in -- in Newberry County. Mr. Oliver is represented by Justin Arenas, and he -- and he filed an action in this case his own personal injury action against Mr. Eluate, Quality Haulers and Mr. Orinda, US Xpress in Newberry County. And then there's also a subrogation, as I mentioned, where the -- where Great West Casualty is as a subrogee of -- of US Xpress has filed a property damage claim.

That's really not a purpose of this, Judge. We have -- we're before our arbitration panel. There's a de novo appeal obviously from that and which will be taken, I presume anyway. And then I think that would honestly get subsumed up under one of these other actions for that. But we have to deal with that.

So, Judge, what we're asking you to do is basically join and consolidate these cases around the one Cozby's here. And as I told you, we're the only party that has filed a

motion to consolidate. My understanding is Judge is a lot of back and forth and -- and I, you know, I don't know where everyone is here today. I'm sure we'll hear from them on that. But in regards to this case, I -- I think there was some consensus by the other parties that they were to consolidate, but they want to consolidate Newberry County.

And then we've had these flurry of -- of memorandums that occurred in the -- in the wee hours last night and then on Friday. So we will obviously talk about that. But I would say that there is a -- a genuine disagreement on the law in the state of South Carolina and the law about venue and the law about -- law about consolidation and joinder.

Quickly, Judge, a standard in this, just so you know, Your Honor has broad discretion to order consolidation. And I respectfully submit, you have broad discretion to join the parties. You're also you know, I'm going, I -- I understand I have the burden of showing that joinder and consolidation are appropriate here, and I submit, Judge. We'll -- we'll meet that burden. Joinder is -- is by Rule 20, and consolidation is by Rule 42, I think here for today's purposes, Judge, it's about Rule 20.

We got into a -- I see the memorandums that were filed over the weekend. Say, raise the issue that Rule 20 is not appropriate and it has to be filed under Rule 19. Judge, there's not a lot of case law out here on either one of

those. But I can tell you the way I rule -- read Rule 19 is Rule 19 is an indispensable party, and that is when someone is not a active party to a lawsuit, but joinder is when you bring others into there as a plaintiff or a defendant.

So I -- I know they say we mixing up the -- the rules and not appropriately for them on 19. I respectfully submit that's not true. I respectfully submit that I think they're the ones that are -- are confused on in that regard as it relates to that. And we'll talk about that here in a little bit.

Judge, in order to join for a joinder, there are two requirements that we must meet. We must meet claims arise out of the same transaction or occurrence, and that claims involve a common fact of law. Rule 42 just states, if you meet one of them, the common question of law and fact. And so, Judge, as you know, this action, all three of these actions arise out of the wreck on I-26 from -- that was here.

And all of these have a common question of law or fact, and that's whose negligence? Whose fault is it -- is the negligence in this case, and out -- rising out of that same occurrence. And that's the wreck. I go -- I read with interest some of their arguments, Judge, the attorneys from Mr. Orinda and US Xpress have prepared briefs and filed those there.

Notably, they argue that we don't satisfy the rules.

And again, like I said, I believe that they -- they conflate Rule 19 and say that Rule 19 is a mandatory joinder. And they say that Rule 20 is not a mandatory joinder. And, Judge, in fact, when I read this, I presume I -- I keep seeing this word permissive joinder. And so I -- I think they're conflating the idea of a permissive and joinder -- joinder as that everybody has to consent.

And, Judge, I respectfully say that's not the -- that's not the law as I see it. Again, the law is not -- there's not a wealth of law in regards to this -- this issue. But when I look at, there's one case, and it's Chen versus Thompson, I believe it was cited by Mr. Orinda in his brief. And in that, Judge, it looked like the master joined parties under Rule 20, and the Court of Appeals said that he could do that and upheld that requirement.

So it doesn't look like they came to the party voluntarily. It looked like they were joined, and the court ruled that way. So we acknowledge the plaintiff has a right to choose whether to join -- join the claims. But, you know, and -- and they also, another thing that we get real deep in the weeds in on -- on this, Judge, is they argue that -- that we should not be able to add co-defendants and things to that effect.

And what they talk about, and they cite some law, Judge, which basically comes down to the Tiffany -- Smith

versus Tiffany Case that we all know about; about third party liability. And they argue that just because someone could be joined, that the plaintiff doesn't have to join it.

I agree, Judge. The plaintiff, the law is clear, plaintiffs can pick their defendants, but we're not talking about a plaintiff suing somebody. We're talking about actions already filed. Everything's there before the court, and we're not adding new parties. All we're doing is trying to consolidate all the parties around one another and not do that.

So when they cite Smith versus Tiffany, when they cite that they get to pick who they want to choose or try to conflate the issues of the -- of the doctrine of plaintiff chooses their defendant and say that that stands for a proposition that you can't add additional parties to the case. That's just not true, and that's not the law in South Carolina.

So, Judge, it seems that really the problem gets to the -- to the thing about, you know, I -- I guess everybody would be in agreement for consolidation, although Mr. Orinda says he only wants to stop consolidation for discovery, not for -- not for trial. But -- but the real issue, I guess it boils down to venue.

And so, Judge, in consolidation and joinder, I think this Ellis by Ellis versus Oliver, which is cited by

everybody in their briefs, really gives some clarity as to where -- where venue is under those situations. So in venue Ellis by Ellis was where a -- where the cases were consolidated, and then the plaintiff wanted -- the defendants wanted to be trod in Lexington County when it was pending in Richmond County. He was a doctor, lived in Richmond County, and Lexington County Hospital was in Richmond County.

Mind you, Judge, they charred me about saying that, I'm saying the substantial right, and -- and that that doctrine was overturned with the -- with the passage of the venue statute. But -- but that case right there was decided before the venue statute anyway. So I, you know, you can't -- you can't have it both ways in there. But nonetheless, the Supreme Court said in there that they denied the -- the court -- trial court denied the motion to change venue because the action was properly before the court in Richmond County.

And when they cited the -- where one defendant got defendants in different counties, either one would be appropriate, Supreme Court reversed and said the pleads are not merged under consolidation. And that he had a right to go over there to have his case tried separately in Lexington County in -- in that regard. But that was because there was -- he was entitled to be tried in the county of his residence, which they say is no longer law in South Carolina, but they want to use that in this case.

But -- but here, the one thing that was appropriate and what caught my eye when you looked at this case was the Supreme Court then talked about joinder, and how joinder was not before them and -- and goes on to state, basically an order of joinder was significantly changed. The venue analysis, again, saying the consolidation should be deemed to create multiple defendants and the -- under the venue so that county of any defendant is proper.

And they had a footnote in there says, "Although we are aware, joinder may have been appropriate in this case, that avenue was not chosen by the plaintiff." So that's why we're here before the court on -- on joinder. And so what's -- what the court is clearly saying in that regard is that the venue analysis is much different and the venue is proper in the county where any of the defendants are joined in the case. And so the joinder in this situation, Your Honor, would say that Sumter is appropriate because that's where -- where Thompson is headquartered.

15-7-30(e) says a domestic corporation like Thompson may be tried in the county where the corporation has the principle place of business. We've submitted secretary of state filings, Judge, and as well as several complaints alleged that Thompson is -- is a resident in -- in Sumter County.

So the complaints that are before the court, even in Newberry

County, are recognizing that Thompson is in Sumter County. So again, I think there is proper venue here in Sumter County, obviously on Cozby case. And if you use analysis of any venue, some county could be that if -- if Thompson is sued, because that is one of the -- that is one of the areas where that -- that's one of the options that make it that way.

So this is where we differ on this issue. So venue, Judge, I -- nobody's disagreeing venue is not appropriate in Newberry County. We're not contending that, but we are -- but they're contending it's not appropriate in Sumter County. And the way I look at it, Judge, this was the first action that was filed. We were brought here to Sumter County in our county of residence. And so when I talk about a substantial right, I certainly recognize that the -- that the General Assembly in 2005 mended the venue statute, but it was to help aid in that doctrine of a substantial right.

I mean, you think about this, Judge, you were practicing law back then. I was practicing law back then. I'm not so sure they were. But -- but one thing that I know is at that point, the case law, what the concern was in truck and venue statute, the railroad venue statute, is that people who were headquarters, especially corporations were getting dragged to all corners of the state.

And so the General Assembly came in and -- and

reiterated the substantial right for a defendant to be tried in where he's headquartered or the county of his residence, but it also gave other options. And so that was, you know, where the accident occurred is one of the options. And then if the plaintiff is from out of, I mean, if the defendants from out of state, then where the plaintiff resides.

So there are options in other areas to which you can be -- can be sued. And we're not disputing that we can be sued in -- in Newberry County. In fact, I think one of them raised the fact that we -- that we didn't file a motion under 12(h)(2) or something like that about venue that we now waive the action. There is no -- there's no -- there's no dispute that we are in. That Newberry County is -- is appropriate. It's just that we want to be here in Sumter County and we have substantial right.

We were sued here, and my client's the only defendant that is in this case that actually lives in one of those counties. So again, they have that substantial right, and I don't think it was abrogated by the passage of the venue statute. So I certainly believe that -- that it's appropriate for it to be here. Is it appropriate for it be in Newberry? Yes. But we're asking the Court to join these cases here.

In response to that, Judge, I also saw they spent a lot of time on this 15-7-100, the motion to change venue. That's

certainly an appropriate motion, but that's not an appropriate analysis right here today. The law is that you -- that the court doesn't have to determine convenience of witnesses. We've got attachments of miles from everywhere and things of that effect to one of the briefs, Your Honor.

And so that is an appropriate analysis, but not today. That's an analysis. If they want -- if the Court says we're going to join these cases here in Sumter County and Sumter County's going to have -- have venue and it's going to move forward, then they can make that motion as -- as pure, as perfectly appropriate for that to happen in front of, I mean, to ask motion change on convenience of witnesses later at the time. But it's not -- doesn't have to be right now. And that's not an analysis respectfully what the court should be engaging in at this point.

Judge, the benefits of consolidation and joinder are obviously we -- we have the burden and -- and says purpose of consolidation. Also, I would submit joinder as to prevent multiplicity of litigation to save the party's unnecessary costs to conserve court time and in space and the clear congested documents, I mean, dockets. All these are interests that would be served by joining this case. And we don't need to make the witnesses, the parties, the lawyers do the same thing four times over.

So in essence, Judge, I know not all the parties are

involved, all similar parties involved in the same case, but in these cases, judge, all parties that were involved in the accident would have an opportunity to present a case in one form.

And I think that is very -- very important. Because what we have now is we've got, Cozby has sued us here in Sumter County and has not added Orinda or US Xpress or -- or Quality Haulers. So what we are going to do is have a case over here. We're first up, Judge. I mean this case is probably about ready to hit the docket. And it is -- this is a relatively simple case from the -- from that perspective.

And so what happens if there's a verdict rendered in here. Let's say it's rendered against Mr. -- Mr. Oliver in this case. Does that preclude Mr. Oliver and his own personal injury action? There is issue preclusion no matter what they want to say, and they -- and they state restatements of torts and everything else.

Judge, I read cases this morning that -- that clearly stand for the supposition that there is arguments that could make this issue preclusion. And -- and the problem is -- is it 100 percent clear? No, sir. But is it worth messing it up as a result of -- of having somebody come and have a preclusive effect because they tried one case and others lay in the way -- in the wings and then, you know, you come in here. So let's say, look at this case, if Mr. Oliver comes

in here and Mr. Oliver is found to be negligent in this case, that is going to have to have some type of preclusive effect on him when he comes at his case.

And so that's the whole point that we're saying, Judge. Not that it's a slam dunk, it's arguable. But at that point we need to err on the side of caution and make sure that we don't preclude him from being able to pursue his claims or any other defendant or any other plaintiff over here.

And that by joining the -- the claims, Your Honor, would preclude any issue preclusion. And that is the most important part of it. And -- and, Judge, you know, and respectfully, I mean, I -- I hope that that's not the -- the part of the defense of this case. I mean, I -- Mr. Oliver is clearly does not believe he's negligence. I think we've got plenty of evidence to show he's not negligent. But we don't want to risk precluding his claim because that worst case scenario, Judge, if -- if he has it over here, he -- I think he would have to admit he would be bound by some negligence.

The comparative would have to be determined. Maybe he can say, well, I was negligent, yes, but they didn't tell me. They didn't -- they didn't try the case against Orinda or Eluate. And so, you know, but I don't think you can come in there and deny negligence when a jury found you to be negligent. And so that -- that is a real issue here, Judge, and that's what we are concerned with as we look through

this.

Another issue, Judge, is we -- we have these they argued joinder will create confusion claims, and counterclaims, and all that, and action. Maybe, maybe not. Maybe we can figure it all out. I mean, you -- you got people filing cross claims and cases all the time and counterclaims and things of that effect. I don't think it would do that. But to the extent it does, Judge, the court has an escape valve under 20(b).

It says, "The court may make such orders as will prevent a party from being embarrassed, delayed, or to put expense by inclusion of a party against whom he asserts no claim, and who asserts no claim against him, may have separate trials or make other orders to prevent delay of prejudice." So there's a backstop to this at some point.

So, Judge, you know, as it turns out, if they need to be tried separately, then the court can issue that. And I trust that the courts over here can and make the appropriate termination that everybody's going to have a full and fair opportunity to be heard.

So, Judge, at the end of the day, this is a complicated issue, but it is not really that complicated. It's the fact is that we've got a bunch of people trying to seek compensation or deny liability in one accident. And I think it's most appropriate that we all be joined together for us

to have our day in court without having any potential of issue preclusion and having the court handle that.

And, Judge, I, you know, I respect -- I mean, I respectfully submit, we're in Sumter. We filed this one consolidation action and joinder action. Nobody else has filed one, and we asked it be consolidated over here in -- in Sumter. Nobody's asked for it to be in Newberry or anyone else. Nobody else has filed a motion. And I filed a motion with, there's motions in Newberry pending here, but, Judge, you were the first -- this court was the first to schedule. So I submit this is going to be the binding order.

So we respectfully ask that you join these claims under Rule 20. I'd be happy to answer any questions.

THE COURT: Thank you, Mr. Smith. Let me hear from the other interested parties and if I've got any questions, I'll save them for the end.

MR. SMITH: Thank you, Your Honor.

THE COURT: All right. And folks just for the record, just state your name before you begin your presentation.

MR. BORN: Yes, thank you, Judge. My name is Jamie George Jacob Born, and I represent the Orinda's in one of the actions pending in Newberry. We oppose the Thompson Construction motion for consolidation in Sumter and believe the motion is futile. I'll try to address briefly the reasons why that is the case.

With the Court's permission, though, I'd first like to address the permissive joinder, compulsory joinder argument under Rule 19 and Rule 20. And if the Court would allow me to read briefly. This is from Professor Flanagan's book on South Carolina Civil Procedure. This is on page 168 of the third edition. Rule 20 is permissive and does not require the joinder of parties who might conceivably be interested in the matter. Joinder is compelled only if the restrict requirements of Rule 19 are met.

So that's the basis judge of this permissive versus compulsory argument there. Those are not words or -- or things that we made up or -- or conflated ourselves. They're two distinctly different rules. Joinder may be permissive under Rule 20 without being compelled under Rule 19. The plain language of Rule 20 does not allow for compulsory joinder. We don't need a case to tell us that. The language itself does not permit compulsory joinder under Rule 20. Only the strict requirements of Rule 19 allow for joinder, compulsory joinder.

So that makes a -- a motion under Rule 20, the wrong procedure. You know, they -- they -- the Thompson folks essentially reached this conclusion, which is at least partially correct that joinder of most of the plaintiffs in -- and the defendants in the various actions could be permitted, but it's only that permissive. Thompson

Construction though then goes on to conclude that because it is permissive, it must be compelled and that's not the case.

Here's a quote, Judge from Sims versus Amisub of South Carolina, Inc. It's 408 South Carolina 2002. It's a 2014 Court of Appeals opinion. "Pursuant to Rule 28, a party may choose to join multiple parties as defendants, but joinder is not required." Beyond that, I -- I -- I'm not even confident that joinder even under Rule 19 would work.

The -- his client, Mr. Oliver, other than the Thompson Construction, would not have been able to bring his suit in Sumter County because the only basis for any of these cases being brought here is Thompson Construction. He's employed by Thompson Construction. As Mr. Smith indicated, he would not be able to have brought his case here. Newberry was the only venue, well, not only venue. Newberry was an appropriate venue for him. Sumter was not an appropriate venue for him to file his case.

Moreover, you know, permissive joinder under Rule 20 is described as the banding together and asserting the rights of plaintiffs jointly in one action. The plaintiffs here are not able to join together because they have claims against one another. Moreover, there's certainly claims here that have no common questions with the other suits as suit particular defendants.

Joinder's just -- it -- it's not compelled under Rule

20, and it's not required here under Rule 19. Joint tortfeasors are permissive parties. They are not necessary parties under Rule 19. General considerations of efficiency and convenience of the parties or witnesses is not an appropriate consideration under Rule 19. Again, that comes from Professor Flanagan. And other plaintiffs and possible plaintiffs are not necessary parties, and it must be a necessary party under Rule 19, and that's the only avenue for compulsory joinder.

Thompson Construction essentially argues for joinder using the rules that apply to consolidation and then say, okay, because joinder was allowed, and because consolidation seems appropriate here, joinder must be compelled. But there is no basis for compelling joinder. So we would submit, Judge, that the joinder argument must fail. And without joinder, there cannot be a compelled change in venue to Sumter here for the Newberry actions.

You know, Thompson Construction correctly points out in their brief that consolidation does not change the parties for venue analysis. So the joinder aspect of this is really the only way that they can try to bring everyone to Sumter. Each case is maintaining its own identity if we're consolidated, and -- and they cannot all be brought in Sumter.

I did want to address briefly the venue rules. I -- I

recognize the arguments that Mr. Smith is making, but -- but in the absence of joinder, which cannot be compelled on these facts, then this is a simple venue analysis under Title 15. And while it may have been a -- a complicated and convoluted analysis many years ago, it's not anymore.

Rule 15-7-30(e) provides plainly that the suit against a resident corporation can be brought where the tortious conduct occurred, or where the defendant has its principle place of business. There is no preference in the code or the case law for one over the other. They are both equally permissive and neither is preferred.

Then to change venue requires an analysis under 15-7-100, and that allows the change of venue for only three reasons. The first that the case was brought in the wrong county to begin with, and Mr. Smith has already acknowledged that Newberry is an appropriate venue for every action. The second is if an -- if a fair and impartial trial cannot be had in the county, there's been no allegations of that here. And the third is the convenience of witnesses in the ends of justice.

That's the basis, Judge, for the map in the chart that was submitted with our memorandum. And if you would like, Judge, and if I may approach, I can hand you a copy of those now if you would like.

THE COURT: That'd be fine.

MR. BORN: Judge, what we have here plotted out is just the locations of various parties and witnesses in the Orinda action. As you can see under an analysis of 15-7-100, Sumter County is not more convenient. The first responders in Newberry presumably live in Newberry. The individual defendants all live in the upstate or North Carolina is where the Orinda's are. Their medical providers, at least for Mr. Orinda, are in that area. Presumably the medical providers for the other individual plaintiffs are in the upstate where they live.

Sumter's only closer for two parties to the suit. So under an analysis there, which I think would be where we would have to go next, assuming joinder fails, there's no basis there to transfer venue of these Newberry cases.

Additionally, collateral estoppels not a basis for ordering joinder here. There's a concern raised of a possibility of preclusive effect. So we want to err on the side of caution. The -- the appellate courts here have already addressed those for us in their adoption of the restatement second of judgment's position on collateral estoppel, when you do not have mutuality between the parties.

Mr. Smith seems to express a concern over the offensive use of collateral estoppel, and its possible preclusive effects. But Section 29 of the restatement second of judgments provides limitations to the offensive use of

collateral estoppel. There are several in there, including sort of a catchall, you know, this doesn't seem fair provision. But most approximately or most related to these issues, and particularly related to the Orinda action itself is that you don't get the benefit of offensive collateral estoppel if the claims could have been joined.

That's our position, is these could have been joined, they cannot be compelled to join, but they could have been joined. Therefore, we would not be afforded the benefit of any offensive collateral estoppel.

Again, joinder would not be beneficial here either. You -- we -- we want to err on the side of caution with regard to collateral estoppel, but for possible confusion of jury issues, we're just going to wait and see how that goes. I -- I don't think that's the appropriate analysis here. You know, if all of these cases are tried together, it will be an absolute nightmare.

Even just from jury stripes of who -- who's on the -- we're going to get 20 jurors and each side's going to get four. But who -- who's on each side? Whose counsel's controlling what? Is it the two plaintiffs that are not defendants, which would be Mrs. Orinda and Cozby. Are they the only two on the plaintiff's side and everyone else on the defendant's sides having to split their four strikes? You know, the verdict form would be nightmarish.

It -- keeping the cases separate is more efficient here except for consolidation for discovery purposes. I don't think anyone is opposing consolidation for discovery purposes. And I believe we filed a motion for consolidation in Newberry to consolidate the cases for purposes of discovery and mediation. Any sort of consideration of consolidation for trial at this point is certainly premature.

Again, we're not opposed to consolidation. There -- there can be some benefits there, but it has to be consolidated in Newberry. And that is because one of the claims that was filed could not be filed here. The venue is not proper for the Oliver action here, because the only tie to Sumter County is Thompson and Oliver cannot sue Thompson.

You know, Judge, I'm happy to answer any questions you would have. But just briefly in conclusion it -- it's -- joinder can't be compelled. Joinder's the only way that they're able to force a venue transfer because Sumter is not a more convenient venue. Collateral estoppel is not an issue in this case. Joining these claims for trial would be incredibly convoluted and the more appropriate action in our opinion would be consolidation for discovery purposes in Newberry County where three of the four claims are currently pending. Thank you, Judge.

THE COURT: All right. Thank you very much.

MR. CRANE: May I please the court, Your Honor.

THE COURT: Yes, sir.

MR. CRANE: Marshall Crane. I represent US Xpress Incorporated, US Xpress Leasing Incorporated, and Dean Orinda, and the claims brought by Mr. Kent Oliver, Mr. Smith's individual client. But those were brought in Newberry County and the civil action number that ends in 300.

I'll be brief and try and bounce around a little bit. So I apologize if I'm a little scatterbrained. But Mr. George has covered a good majority of the points in the positions certainly based on our mutual client, Mr. Orinda. There are a few nuances I'd like to point out and then a few things specific to US Xpress. If I may approach, Your Honor, I do have a copy of the memorandum we filed yesterday in the Newberry cases. We're not a party to the Sumter case.

THE COURT: All right. Yes, sir.

MR. CRANE: And again, Your Honor, as initial matter as well, we appreciate you allowing us to be heard in this case. Obviously, being privy solely to the Newberry County case. We -- we appreciate the court's time today. As an initial matter substantively, we would point out that the Ellis by Ellis versus Oliver case has been cited by both Mr. Smith and Mr. George. Specifically talks about the fact that joinder and consolidation are mutually exclusive. You can't have both of them. So we're talking about one or the other when it comes to an adjudication as to what's appropriate.

And the case law really gets into the differences of those being joinder. It is all one action. It's consolidated as one. It would be one verdict form. It would be as Mr. Smith would prefer joined as the oldest case that's already eligible for the trial roster with minimal discovery having been done and also short circuiting the fact that the Newberry County cases were just filed within a couple months, I believe May and June respectively for Orinda and Oliver suits. So it's kind of short circuiting that, but it would -- it would join them all as one. And then for consolidation, the case law is clear. They keep their separate identities.

Again, not to belabor the specific points of consolidation that I believe Mr. George covered very effectively. But I do want to reiterate a couple points on the law of Rule 20. One being the provision for question of law or fact common to all claims.

Again, the only person who's asserting any cause of -- or any causes of action or allegations against US Xpress the corporate entities that I represent that Mr. Orinda was driving for is Mr. Oliver.

Mr. Cozby has not chose to bring those claims. Obviously, my corporate client's subrogee and there are arbitration case for the property damage are not bringing those claims. So those are not met as it -- as it pertains

to US Xpress and US Xpress Leasing.

Even in the -- the counterclaim filed by Mr. Orinda, we -- Mr. Orinda's suit, excuse me, Mr. Oliver's suit that named US Xpress and Mr. Orinda, we filed a motion on 12(b)(8) for failure or for failure to bring that claim in another action. They have since amended that their answer to Mr. Orinda's claims against Mr. Oliver asserting a counterclaim against Mr. Oliver. But there are no -- that does not include third party claims against US Xpress. Those are kept completely separate in that action, followed by Mr. Oliver, where again, Sumter would not be a proper venue.

None of the defendants are domiciled there. And the action didn't happen there. So we think that that aspect of 20, again, under the permissive joinder, because that's the title of the rule as it sits there for South Carolina Rule Civil Procedure 20, isn't met.

And then we also would just bring the court's attention to the SED Heck versus Fed Serve case. It's a Court of Appeals case from 1987, which talks about if efficiency or convenience are met. That's -- even that is not enough to require joinder. Again, Mr. George has cited the Amisub case, which states that it's not required permissive joiner is not required again, but that SED Heck and Feds Serve give even more reasons where even would it -- where it would make functional sense in that case, it wouldn't be.

But we would submit to the court, Your Honor, that it would not make functional sense here. The efficiency and convenience would not make sense because again, it would be bringing my corporate clients US Xpress into a lawsuit and into a lawsuit pending in the county that otherwise would not be appropriate.

They would be put to the expense of having to try a case with a party that is not making claims against them. And that's the exact language that South the -- the Rule 20(b) provides for -- for separate trials. So if we're already looking at the provision in separate trials, it go -- brings -- goes back to the question, why would we even be doing joinder, which isn't mandatory or compulsive in the first place?

And again, that separate trials goes back to the motion for consolidation. As Mr. George has represented, he's filed the motion in the Newberry case initiated by Mr. Orinda. We have similarly filed a motion for consolidation for discovery and the case brought by Mr. Oliver in Newberry.

It's my understanding that Mr. Cozby who brought the suit in Sumter County has consented to those motions and is agreeable to consolidating for discovery under the Newberry cases. And again, the consolidation for discovery only allows Thompson, to have their right on the Cozby case to have the case tried here, subject to any motions that Mr.

Cozby may make later or that Mr. Thompson may make later. It allows the individual parties to try the claims brought against them and that they're bringing on their behalf. And it takes away a lot of the concerns that Mr. George talks about with jury strikes and more importantly, the verdict form.

Your Honor, if this was joined as to one case, the amount of legal gymnastics required in that verdict form for being first Mr. Cozby's case and cause of action, which don't include Mr. Orinda, which don't include US Xpress informing the jury that if you find negligence and you find an apportionment to Mr. Oliver or Mr. Eluate, who Mr. Eluate and Quality Transport are defendants in the Sumter case. So if you find that their negligence equals 100 percent, then that would preclude any finding as to Mr. Orinda and Mr. Eluate and US Xpress, yet we would still be put through the burden of having to try that case, present that case.

And then we're already talking about things that I've candidly, Your Honor, spent many hours this week, and Madison Killen in our office has helped me as well. Just trying to figure out how it even works to present it to you. We just envision when we're presenting that to a verdict form, trying to get some unanimous decision there and then your instruction to the jury on how to interpret that. I think that's the exact reason that 20(b) exists, even under

permissive joinder, which isn't required. We don't have to try them together.

So then it brings us to the consolidation, which again, I -- I think the only people we haven't heard from are Mr. Eluate and Quality on their position as to discovery for the purposes of -- of, or consolidation for the purposes of discovery. I would assume if Mr. Smith, on behalf of Mr. Oliver and Mr. -- I mean, Thompson would consent to discovery or consolidation for trial, they would naturally consent to consolidation for discovery as well. Then we're just arguing about whether Sumter is the proper venue.

Again, this motion to consolidate and join, which again, can't be done together, has to be one or the other in Sumter County is brought by one of the defendants that has no claims aggressively. Thompson is not a plaintiff in any form or fashion in any of these cases. They're the only defendant that's domiciled in Sumter, even their employee is -- is domiciled and -- and the upstate.

And again, they're not a privy to the only case brought against US Xpress. And so, Your Honor, again, just one -- one last point on the case law is that the Ellis by Ellis versus Oliver Case specifically talks about consolidation not being a vessel to create venue. I -- I've -- I've briefly mentioned that to, Your Honor, the court, the big difference being consolidation. They retained their separate identities

again, on behalf of US Xpress and Mr. Orinda, we believe that's the appropriate action for this court.

And so what's before the court today with Thompson's motion to consolidate for -- for trial and joinder. We would submit, as we've just discussed, and as we've briefed, it's not appropriate to do both, and it wouldn't be appropriate to join these cases. It's not required to join these cases. And that certainly consolidation for trial. There's no need to make that determination now.

The rule provides under 42 for the ability to do that in the future and consolidation broadly for just discovery for specific hearings or for the whole thing. And there's no need to make that determination now. And if -- even if there were, there's no proper venue for Sumter County with the claims against US Xpress, so they would be unfairly prejudiced to be hailed into court here to have to defend this.

Thank you, Your Honor.

THE COURT: Thank you, sir.

MS. FRANKLIN: Your Honor, I'm here on behalf of Mr. Cozby and we agree to consolidation. So I don't have much to add and agree with Mr. George and Mr. Crane. I will say my client lives in Korea, so for the purposes of discovery, it's not going to make a difference if he has to come back to South Carolina to Newberry or Sumter. Our case would've been

proper in Newberry either way. So we are okay to consolidate for the purposes of discovery in Newberry and come time for trial, which won't be anytime soon because depositions haven't been done, then we would revisit that argument at a later date.

THE COURT: All right. Ma'am, give me your name just for the record.

MS. FRANKLIN: Ivey Franklin. Thank you, Your Honor.

THE COURT: All right.

MR. DAWSON: And, Your Honor, Hood Dawson here on behalf of Mr. Eluate and Quality Haulers. Again, we don't have much to add to this. We are in support of Mr. Smith's motion. We have no objection to it, and no objection to consolidating in Sumter at all.

THE COURT: All right. Thank you, sir.

MR. SMITH: Judge, just briefly respond back.

THE COURT: Yes, sir.

MR. SMITH: A couple of these issues, and I'll conclude here. Judge, and -- and I guess what I heard on the end is I -- I think I'm asking the court we filed for consolidation and joinder. I'm asking the Court for joinder. Because that takes care of any venue issues here, and I think that's the most appropriate thing to do.

I'll -- I'll go through these one by one. I, you know, I -- I'm a little concerned. I -- I think Mr. Crane spoke

for me and said that I would probably consent to consolidation for discovery purposes. I want these cases tried together. I don't want to get, if -- if I've got to have this one case that I'm defending over here and have that -- and have that wait forever. If they're going to say, you know, you don't need to worry about collateral estoppel, then, you know, I think my best case I got is right here.

And if I get -- if I get a defense verdict, which I very well may, then that may just solve all my issues. And so, you know, I -- but, you know, we'll -- we'll see and let them figure that out. But I -- I submit, Judge, the whole problem we got here is that -- that we are playing in the land of unknown. And I read cases this morning that were cited by them that -- that stood for the proposition, or they were in some of their opinions, stood for the proposition that there can be some offensive collateral estoppel.

And -- and, you know, and -- and the question they have is they -- they make proclamations and say, this is no problem. It's -- it's not it, but what if they're wrong? As my law professor told -- used to tell me it was back when cokes were 50 cents, but 50 cents and your opinion and 50 cents is still just going -- it's still going buy you a Coca-Cola.

So, Judge, you know, I -- I think that's an issue. Permissive joinder, they say cannot be compelled. Two cases,

and they were cited by them. I -- I read these, I can't remember which one it was in. Says, "We affirm the decision of the master." That means the master. This is Chan versus Thompson, 302 S.C. 285. We affirmed the decision of the master to add the other companies owned by the chance of the litigation on the breach of contract claim.

So that right there showed that they did that. And obviously it was appealed by the -- by the plaintiffs and the court upheld that. Says, you know, they find that there is some evidence. These companies were set up by the Chans and utilized channel sales away from Lisa Floral in such a way, deprive the Thompsons of sales commissions. Permissive joinder of these companies was proper under 20 SCRCP.

So there's a judge that ordered it. Then the other case is Gann versus Mongo. Again, they -- this is a potential class action where they join a number of different parties who don't all have the exact same type of claims here. And it says, "We attach, you know no merit to the defendant's contention concerning a joinder or the parties plaintiff, the permissive joinder Rule 20(a) has determined who may joinder action.

Says the rule allows several persons to join in plaintiff and assert in single action if they assert the right to relief jointly or severally, or in the alternative respect are rising out of the same transaction occurrence of

sent or -- or occurrences, if any of the law of -- or fact are common to all these persons will rise in that action. And so what they want to say is there are different causes of action or different questions in different lawsuits.

So, Judge, if you read Rule 20, it says that it's arising out of the same transaction occurrence or series of transactions or occurrences, if any -- any, not all, if any question of law of fact to these purposes will rise in that action. So there are -- every one of them has one common -- one common law, question of law or fact in there.

Judge, the consolidation doesn't change. I -- I've heard their arguments about Amisub and obviously that's a 1992 case. Current law wasn't in effect at that point. They still arguing 15-7-100. Again, that can be held later at a different time. And that the convenience of witnesses is not really appropriate to be determined. Now the question is; is there -- is there appropriate venue here in Sumter? And there is, if the court consolidates it here, I still don't understand why they don't want the case here in Sumter.

But, you know, nonetheless, I -- I don't think it's an inappropriate venue if it's -- if the cases are joined because they're there. This -- about jury strikes. Judge, I -- that's the bad thing about being a defendant. Unfortunately, I'm there often, but when I have co-defendants, all of us have to figure out, the court

doesn't give me any extra strikes. It's not a criminal case. I don't get 10 or get more with multiple defendants. We get our requisite amount of strikes and that's the way it is and we have to work it out together. And that isn't a tough concept, but that happens in courtrooms all over the state every week.

They also ask about the complaint. They say this is the oldest case. They may be dragged in here. Judge, I'm willing to enter into scheduling order. I don't think if we have all these parties, I think if -- I don't think you're -- I think your chief admin judge over here, but I don't think you're going to force anyone to trial when the case just started. Never seen you do that before. I don't think you'll start here. And I think you would put it -- the case on scheduling order. And that's a simple resolution to that issue.

The collateral estoppel issue, again, Judge, you know, that -- that is where -- where we -- where we hang our hat on this issue. This -- this has really got some concerns. And, you know, if we're -- if we're not careful, we're going end up with inconsistent verdicts and people are going to have -- have collateral estoppel, and then we're going to have issues.

I think I've done what I needed to do. I've made a motion to join, I've raised those issues. And so at that

point, you know, Judge, I -- I think that's probably what we need to be most concerned about because there's no absolute certainty that this is not collateral estoppel, and it could be under a number of different scenarios. And out of an abundance of caution, I would ask you to join these claims under Rule 20, which is appropriately -- which is absolutely appropriate under the case law in this state that judge can -- can join the claims and -- and leave venue here in Sumter.

THE COURT: Thank you, Mr. Smith.

MR. SMITH: Thank you, Your Honor.

THE COURT: All right. Folks, obviously there's a -- a lot of information that's been submitted to the court some relatively recently. And I'm not finding fault with anybody. I understand that -- that things get done at the last minute all the time. I -- the things that were submitted over the weekend, I frankly haven't had the opportunity to -- to read and study any -- any great detail.

So I'm going to take this matter under advisement and ordinarily I like to -- to give people a date that I'm going to have a decision made. But in this case given my schedule over the next few weeks, I don't want to promise you anything that I -- I don't want to set myself up for failure. So I -- I will promise that I'll make a decision in a reasonable amount of time. I will notify the parties by email and direct the -- if -- direct the prevailing party to prepare

the appropriate order.

So if anything needs to be -- I don't mind if -- if anybody has anything they want to supplement or anything that needs to be brought to my attention while this matter is under advisement, just submit it via email is the best way.

MR. SMITH: Sometimes I -- I fail when you supplement, then we've got the (inaudible) everyone starts going back forth --

THE COURT: Yeah.

MR. SMITH: -- circular in that -- in this type case. But hopefully we'll avoid that.

THE COURT: And -- and I -- I don't -- I hope there's nothing else. I think what's been submitted is probably detailed enough. I think it's probably going to put the ball in my court to -- to read and digest all of these matters. But if anything comes up that's out of the ordinary that needs to be brought to my attention I know I'm in court the next three, four weeks in a row, so you all email is the best way. If I'm on the road, I -- you know, so. And email my law clerk's the best way to get -- to get it to me. So if you all will do that, but I will make the decision in a -- in an appropriate amount of time. Thank you all very much. I appreciate everybody being here.

MR. SMITH: Thank you, Your Honor. (Crosstalk).

THE COURT: All right?

(THERE BEING NOTHING FURTHER, THIS HEARING CONCLUDED AT 10:40 A.M.)

CERTIFICATE OF TRANSCRIBER

I, NATASHA BARRIENTOS, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in South Carolina Circuit Court 3 of Sumter County, South Carolina, on the 9th Day of October, 2023.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 22, 2024

Natasha Barrientos

Transcriber

Ex. 2

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Jerry Cozby,

Plaintiff,

vs.

Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Ouellette, and Quality Haulers, Inc.,

Defendants.

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Dean Alan Arender and Tamala Arender,

Plaintiffs,

vs.

Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Kent Ouellette, and DMX Transportation Services, Inc.,

Defendants.

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Kent Huntley Oliver,

Plaintiff,

vs.

Curtis Kent Ouellette, Quality Haulers, Inc., Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
C/A NO.: 2022-CP-43-01006

ORDER

The matter before the Court is a motion for permissive joinder and consolidation filed by Defendants Kent Huntley Oliver and Thompson Construction Group, Inc. (hereinafter and collectively, "Thompson"). In the motion, Thompson requests the Court to join and consolidate two lawsuits pending in the Newberry County Court of Common Pleas with this lawsuit filed by Plaintiff Jerry Cozby ("Cozby"). Thompson seeks to join and consolidate the three cases for discovery and trial in the Sumter County Court of Common Pleas under the case number assigned to the Cozby action.

A hearing on Thompson's motion was held on October 9, 2023, with adequate notice provided to all parties in the affected cases. The Court heard argument from counsel for all interested parties, as set forth in more detail below. The Court has carefully considered Thompson's motion, all memoranda submitted by the interested parties, the arguments offered during the hearing, and the relevant law. For the reasons set forth below, the Court grants Thompson's motion.

BACKGROUND

All lawsuits referenced in this Order arise from a multi-vehicle accident that occurred on Interstate 26 near Jalapa, South Carolina on November 12, 2020. Four individuals were involved in the accident: (1) Jerry Cozby; (2) Curtis Ouellette, driving for Quality Haulers, Inc.; (3) Kent Huntley Oliver, driving for Thompson Construction Group, Inc.; and (4) Dean Arender, driving for U.S. Xpress, Inc. and/or U.S. Xpress Leasing, Inc. Since the accident, the following lawsuits have been filed:[1]

[1] Great West Casualty Company, as subrogee of U.S. Xpress, Inc., filed a claim for property damages before the Newberry County Arbitration Panel. *See Great West Casualty Company v. Thompson Construction Group, Inc., et al.* C/A No. 2023-CP-36-00125. Thompson did not seek to join and consolidate that action in its motion. Accordingly, the Court does not address that action in this Order.

- *Cozby v. Oliver, et al.* ("Cozby Action")
  - C/A No. 2022-CP-43-01006
  - Plaintiff: Jerry Cozby
  - Defendants: Kent Huntley Oliver; Thompson Construction Group, Inc.; Curtis Ouellette; and Quality Haulers, Inc.
  - Venue: Sumter County Court of Common Pleas

- *Arender v. Oliver, et al.* ("Arender Action")
  - C/A No. 2023-CP-36-00276
  - Plaintiffs: Dean Arender and Tamala Arender
  - Defendants: Kent Huntley Oliver; Thompson Construction Group, Inc.; Curtis Ouellette; Quality Haulers, Inc.; and DMX Transportation Services Inc.
  - Venue: Newberry County Court of Common Pleas

- *Oliver v. Ouellette, et al.* ("Oliver Action")
  - C/A No. 2023-CP-36-00300
  - Plaintiff: Kent Huntley Oliver
  - Defendants: Curtis Kent Ouellette; Quality Haulers, Inc.; Dean Arender; U.S. XPRESS Leasing, Inc.; and U.S. XPRESS, Inc.
  - Venue: Newberry County Court of Common Pleas

On August 18, 2023, Thompson moved to join and consolidate the Cozby Action, the Arender Action, and the Oliver Action for discovery and trial under Case No. 2022-CP-43-01006, the number assigned to the Cozby Action.

As noted above, the hearing on Thompson's motion was held on October 9, 2023. G. Murrell Smith, Jr. and Frederick N. Hanna, Jr. appeared on behalf of Thompson Construction Group, Inc. and Kent Oliver. E. Hood Dawson, III appeared on behalf of Defendants Curtis Ouellette and Quality Haulers, Inc. Ivey B. Franklin appeared on behalf of Plaintiff.

Counsel for additional parties in the Arender Action and the Oliver Action also attended the hearing and presented argument. Justin J. Arenas appeared on behalf of Kent Huntley Oliver. Jacob D. Born and James D. George, Jr. appeared on behalf of Dean Arender and Tamala Arender (hereinafter and collectively, "Arender"). Marshall C. Crane and Madison C. Killen appeared on behalf of U.S. Xpress Leasing, Inc. and U.S. Xpress, Inc. (hereinafter and collectively, "U.S. Xpress").

ARGUMENT

In its motion, Thompson asks the Court to join and consolidate the Cozby Action, the Arender Action, and the Oliver Action for discovery and trial in the Sumter County Court of Common Pleas. Thompson advances three primary arguments in support of its motion. First, Thompson contends it would be proper for the Court to join and consolidate the cases because the requirements of Rules 20(a) and 42(a), SCRCP, are satisfied. Next, Thompson asserts that upon joining and consolidating the cases, venue would be proper in Sumter County. Finally, Thompson argues joinder and consolidation are in the best interest of the parties and the Court.

The primary opponents to Thompson's motion are Arender and U.S. Xpress. Although Arender and U.S. Xpress indicate they would be willing to consent to consolidation for discovery purposes only in Newberry County,[2] they oppose Thompson's request for joinder and consolidation for discovery and trial in Sumter County. U.S. Xpress contends it is improper for Thompson to seek both joinder and consolidation. Both Arender and U.S. Xpress argue joinder would be improper under the circumstances presented in the collective cases and that venue would be improper in Sumter County. Finally, Arender and U.S. Xpress argue joining and consolidating the cases for trial would be undesirable.

Before addressing these arguments, for sake of completeness, the Court notes the parties' respective positions on joinder and consolidation. Thompson, Oliver, Ouellette, and Quality Haulers, Inc. support Thompson's motion for joinder and consolidation for trial and discovery in Sumter County. Cozby, Arender, and U.S. Xpress oppose Thompson's motion, but would be

[2] On October 6, 2023, U.S. Xpress filed a motion to consolidate the Cozby Action, the Arender Action, and the Oliver Action for discovery in the Newberry County Court of Common Pleas.

agreeable to consolidation for discovery in Newberry County. The Court now addresses the substantive arguments of the parties.

I. Thompson's request for joinder and consolidation

In its motion, Thompson requested that the Court grant permissive joinder and consolidation of the cases under Rules 20(a) and 42(a), SCRCP. In response, U.S. Xpress contends Thompson's request for both permissive joinder and consolidation is improper. U.S. Xpress relies primarily on *Ellis v. Oliver*, in which the South Carolina Supreme Court discussed the differences between permissive joinder and consolidation. 307 S.C. 365, 367-68, 415 S.E.2d 400, 401-02 (1992) (explaining that pleadings are merged into one action under permissive joinder, but separate actions retain their own identity under consolidation).

During the hearing, counsel for Thompson clarified that Thompson only sought permissive joinder of the cases. In light of Thompson's decision to pursue permissive joinder only—not permissive joinder and consolidation—it is unnecessary for the Court to rule upon U.S. Xpress' argument. The Court only considers Thompson's request for permissive joinder in the remainder of this Order.

II. The requirements for permissive joinder are satisfied

Thompson requests permissive joinder of the Cozby Action, the Arender Action, and the Oliver Action under Rule 20(a), SCRCP. Thompson contends that because the threshold requirements of Rule 20(a) are satisfied, the Court should exercise its authority and join the cases. Thompson contends it is desirable for the Court to do so for several reasons, which the Court will address below in Section IV of this Order.

Both Arender and U.S. Xpress contend it would be improper for the Court to join the cases under Rule 20(a). Arender and U.S. Xpress contend that because joinder under Rule 20 is

permissive rather than mandatory, Thompson cannot compel the Court to order joinder in this instance. Arender claims that because Thompson requests mandatory joinder, its arguments should be analyzed under Rule 19(a), SCRCP, which Arender contends is not applicable. U.S. Xpress further argues the requirements of Rule 20(a) are not satisfied because "the question of any negligence of Arender or [U.S. Xpress] is not 'common' to any party other than Oliver."

Arender and U.S. Xpress' arguments with respect to "mandatory" joinder rest on a mischaracterization of Thompson's argument. Thompson plainly moved for "permissive joinder" under Rule 20(a) and never argued that joinder was mandatory. Indeed, Thompson never suggested that either the parties or the Court were required to join the claims in one action. Nor did Thompson assert any arguments based on Rule 19, SCRCP. Instead, Thompson simply requests that the Court exercise its discretion and join the cases because they arise from the same series of occurrences and share common questions of law and fact. Accordingly, the Court rejects Arender and U.S. Xpress' suggestion that Thompson seeks "mandatory" joinder.

Although South Carolina's courts have not frequently discussed Rule 20(a), the Court has broad discretion under that Rule to decide the scope of civil actions. *See Hedberg v. Darlington Cnty. Disabilities & Special Needs Bd.*, 133 F.3d 915 (4th Cir. 1997) (discussing district court's discretion under Fed. R. Civ. P. 20(a), which is substantially similar to Rule 20(a), SCRCP). The Rule explains when parties may be permissively joined into one action:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to

> their respective rights to relief, and against one or more defendants according to their respective liabilities.

Rule 20(a), SCRCP.

The Court agrees with Thompson that permissive joinder of the Cozby Action, the Arender Action, and the Oliver Action is permitted under the applicable framework. First, there is no question that each of these actions arises from the same "occurrence" or "series of . . . occurrences"—the November 12, 2020 multi-vehicle accident. Additionally, there is at least one question of law or fact common to each of the plaintiffs and defendants in the three cases. Each of the actions involves common questions of fact about the details of the accident (including the weather conditions surrounding the accident) and the extent of the parties' damages. These actions also share questions of law relating to the parties' respective negligence and causation.

U.S. Xpress' argument that there is no shared question as to Arender and U.S. Xpress' negligence is incorrect. First, even assuming that only Oliver had an interest in determining Arender and U.S. Xpress' negligence, this argument misapplies Rule 20(a). Rule 20(a) does not require that *all* questions of fact or law be common to each of the parties; instead, it is sufficient if there is "*any* question of law or fact common" to the parties. Rule 20(a), SCRCP (emphasis added). In any event, Oliver is not the only plaintiff with an interest in determining Arender and U.S. Xpress' negligence. Arender and U.S. Xpress' negligence is also at issue in the Cozby Action, where defendants have asserted that Cozby's injuries were caused by the fault of others, and in the Arender Action, where defendants have asserted comparative negligence defenses.

Therefore, the Court agrees with Thompson that the requirements of Rule 20(a) are satisfied, and the Court may exercise its discretion to join these cases.

III. Venue in Sumter County is proper

Thompson next contends that venue would be proper if the Court joins these cases for discovery and trial in Sumter County. According to Thompson, because the pleadings are merged after an order of permissive joinder, *see Ellis*, 307 S.C. at 367, 415 S.E.2d at 401, venue is proper in the county of residence of any defendant in the Cozby Action, the Arender Action, or the Oliver Action. *See* S.C. Code Ann. § 15-7-30(B) ("If there is more than one defendant, the action may be tried in any county where the action properly may be maintained against one of the defendants pursuant to this section."). In further support of its request to join the cases in Sumter County, as opposed to a proposed consolidation in Newberry County, Thompson relies on the fact that it is the only Defendant that has been sued in its county of residence. Thompson contends it should not be deprived of its "substantial right" to a trial in its county of residence. *See, e.g.*, *Carroll v. Guess*, 302 S.C. 175, 177, 394 S.E.2d 707, 708 (1990).

Arender and U.S. Xpress offer different arguments for why Thompson's position as to venue is incorrect. Arender perceives Thompson's argument for venue in Sumter County as an attempt to change venue under section 15-7-100(A). Arender asks the Court to deny Thompson's request for a change in venue because Thompson cannot demonstrate "the convenience of witnesses and the ends of justice would be promoted by the change." *See* S.C. Code Ann. § 15-7-100(A)(3).

U.S. Xpress, on the other hand, contends venue would be improper in Sumter County because the Oliver Action could not have been brought in Sumter County. U.S. Xpress further argues that after the 2005 amendments to the venue statute, a plaintiff has a right to bring suit either in the venue where a defendant resides or where the most substantial part of the act or omission occurred. *See* S.C. Code Ann. § 15-7-30.

The Court agrees with Thompson that venue for the joined cases is proper in Sumter County. As Thompson notes, an order of permissive joinder merges previously separate actions into one. *See* Rule 20(a), SCRCP; *see also Ellis*, 307 S.C. at 367, 415 S.E.2d at 401 (discussing the difference between an order of consolidation and an order of permissive joinder). Therefore, for venue purposes, the residency of each defendant in each of the merged actions is considered. *See* S.C. Code Ann. § 15-7-30(B); *see also Ellis*, 307 S.C. at 367 n.2, 415 S.E.2d at 402 n.2. Because Thompson is a resident of Sumter County, venue for these joined actions is proper in Sumter County. *See* S.C. Code Ann. § 15-7-30(E) (stating an action tried against a domestic corporation must be brought and tried in the county in which the corporation has its principal place of business or where the most substantial part of the alleged act or omission occurred); § 15-7-30(B) ("If there is more than one defendant, the action may be tried in any county where the action properly may be maintained against one of the defendants pursuant to this section.").

Contrary to U.S. Xpress' position, the fact that the Oliver Action could not have been brought in Sumter County does not change the analysis. This argument overlooks the impact of an order of permissive joinder, which merges the previously independent actions into one. Accordingly, the relevant task is not to determine where venue would properly lie for each of the independent actions; the proper question is where venue properly lies for the merged actions. As the foregoing discussion demonstrates, venue for the merged actions is proper in Sumter County.

The Court also rejects Arender's arguments under section 15-7-100. Although the Court's Order effectively changes the venue of the Arender Action and the Oliver from Newberry County to Sumter County, the Court's Order is not based on section 15-7-100. Indeed, Thompson does not seek a change in venue based on the convenience of witnesses and the ends of justice. Thompson simply seeks to join the cases into one in Sumter County, which it contends is a proper

venue under section 15-7-30. Because the Court is not faced with a motion under section 15-7-100, the Court need not consider Arender's argument respecting the most "convenient" forum for these cases to be heard.

Finally, the Court finds that Cozby's decision to sue Thompson in its county of residence is significant to the venue analysis. Because these actions were filed in different counties, Thompson's request for joinder necessarily requires a change of venue for either the Cozby Action or the Arender Action and the Oliver Action. Although Arender and U.S. Xpress desire for these cases to be consolidated in Newberry County, the Court agrees that Thompson has a substantial right to be tried in its county of residence. Contrary to U.S. Xpress' argument, the 2005 amendments to the venue statute did not impact that right, as recognized by the South Carolina Supreme Court in a decision shortly after the amendment. *See Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 442, 633 S.E.2d 143, 147 (2006) ("The defendant has a substantial right to be tried in the county of his residence pursuant to S.C. Code Ann. § 15–7–30 (2005)."). Thompson's substantial right to be tried in Sumter County vested when Cozby elected to bring suit there. Importantly, no other defendants in any of these cases were sued in their county of residence. Accordingly, Thompson's right to defend the Cozby case in Sumter County further supports the Court's decision to join these cases in Sumter County.

IV. Joinder is desirable for the parties and the court

Lastly, Thompson asks the Court to join these cases for discovery and trial because it has demonstrated that doing so would be desirable. Thompson contends joining the cases would prevent duplicative litigation, save the parties from incurring unnecessary costs, and conserve judicial resources. Thompson also contends joining the cases would eliminate the risk of a judgment in one case having preclusive effect in all other cases. *See, e.g., Sims v. Amisub of S.C.,*

Inc., 408 S.C. 202, 209, 758 S.E.2d 187, 191 (Ct. App. 2014), *aff'd*, 414 S.C. 109, 777 S.E.2d 379 (2015) (noting the doctrine of collateral estoppel "prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same").

In response, Arender and U.S. Xpress contend the cases should not be joined for trial. Relying on the Restatement (Second) of Judgments § 29, Arender contends offensive collateral estoppel is not a realistic concern in these cases. U.S. Xpress argues these actions are not appropriate for joinder because a single trial would involve numerous claims and parties and would be difficult for jurors to understand. U.S. Xpress also claims it would be improper to join these actions under the case number assigned to the Cozby Action because it is the oldest case and will be subject to trial before the parties can adequately prepare.

The Court agrees with Thompson that joinder for both discovery and trial is justified under the circumstances presented in these cases. Plainly, it will be less burdensome for all parties and the Court to join these proceedings. Joinder will reduce cost to the parties, conserve judicial resources, eliminate the need for repetitive discovery, reduce the burden on witnesses, and prevent inconsistent judgments. To put it simply, it would be incredibly inefficient to litigate these claims separately.

Additionally, as Thompson argues in its motion, joinder will eliminate the risk of collateral estoppel applying to prevent adjudication on the merits. The South Carolina Supreme Court has recognized that the offensive use of nonmutual collateral estoppel may be appropriate in certain circumstances. *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). Arender contends this concern is not legitimate, as the Restatement provides that a person seeking to invoke favorable preclusion may not do so if he could have

effected joinder in this first action. *See* Restatement (Second) of Judgments § 29(3). Regardless of whether that exception would apply to prevent offensive collateral estoppel, the safest course at this stage is to join the actions and thereby eliminate the risk of judgments having preclusive effect.

Furthermore, the Court is not persuaded by U.S. Xpress' arguments about a single trial being confusing for jurors to follow. Lawyers and judges in this State frequently try cases involving numerous claims and parties. The Court finds the benefits of joinder outweigh any concerns associated with a single trial. In any event, should U.S. Xpress' concerns prove legitimate as trial approaches, Rule 20(b) provides the Court with flexibility to ensure an efficient trial process. Rule 20(b), SCRCP ("The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.").

Finally, U.S. Xpress' argument respecting the age of the Cozby Action is without merit. As noted above, U.S. Xpress opposes joining these cases around the Cozby Action because it is the oldest case and may be called for trial before the parties have time to conduct necessary discovery. This dilemma can easily be resolved by the parties entering into a scheduling order. The parties will not be forced to a trial before they have had time to perform adequate discovery.

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CONCLUSION

For the foregoing reasons, the Court grants Thompson's motion and joins the Cozby Action, the Arender Action, and the Oliver Action around Case Number 2022-CP-43-01006, the number assigned to the Cozby Action.

IT IS SO ORDERED.

The Honorable R. Kirk Griffin
Circuit Court Judge

February ___, 2024
Sumter, South Carolina

Sumter Common Pleas

Case Caption: Jerry Cozby VS Kent Huntley Oliver , defendant, et al

Case Number: 2022CP4301006

Type: Order/Consolidate

So Ordered

s/ R. Kirk Griffin 2768

Ex. 3

STATE OF SOUTH CAROLINA COUNTY OF SUMTER Jerry Cozby, Plaintiff, vs. Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Ouellette, and Quality Haulers, Inc., Defendants.	)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT C/A NO.: 2022-CP-43-01006
STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY Dean Alan Arender and Tamala Arender, Plaintiffs, vs. Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Kent Ouellette, and DMX Transportation Services, Inc., Defendants.	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT C/A NO.: 2023-CP-36-00276 **MOTION FOR PERMISSIVE JOINDER AND CONSOLIDATION**
STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY Kent Huntley Oliver, Plaintiff, vs. Curtis Kent Ouellette, Quality Haulers, Inc., Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc., Defendants.	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT C/A NO.: 2023-CP-36-00300

TO: JACOB D. BORN, ESQUIRE, JAMES C. SPROAT, ESQUIRE, ATTORNEYS FOR PLAINTIFFS; PLAINTIFFS; PHILLIP E. REEVES, ESQUIRE, ATTORNEY FOR CURTIS OUELLETTE AND DMX TRANSPORTATION SERVICES, INC.; CURTIS OUELLETTE; AND DMX TRANSPORTATION SERVICES, INC.:

YOU WILL PLEASE TAKE NOTICE that Defendants Kent Huntley Oliver and Thompson Construction Group, Inc. (collectively, "Defendants"), by and through the undersigned counsel, hereby move and request this Honorable Court for Newberry County to enter an Order Granting Permissive Joinder and Consolidation of the above-referenced cases under one (1) case number. This Motion is made pursuant to Rules 20(a) and 42(a) of the South Carolina Rules of Civil Procedure, applicable South Carolina statutes and case law, and the following:

1. All cases referenced in this Motion arise out of a multi-vehicle accident that occurred on Interstate 26 near Jalapa, South Carolina on November 12, 2020.

2. Plaintiff Jerry Cozby filed a Summons and Complaint in the Sumter County Court of Common Pleas against Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Ouellette, and Quality Haulers, Inc. bearing Case No. 2022-CP-43-01006 ("Cozby Action"). The Cozby Action was the first action commenced.

3. Subsequently, Plaintiffs Dean Alan Arender and Tamala Arender filed a Summons and Complaint in the Newberry County Court of Common Pleas against Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Kent Ouellette, and DMX Transportation Services, Inc. bearing Case No. 2023-CP-36-00276 ("Arender Action"), and Plaintiff Kent Huntley Oliver filed a Summons and Complaint in the Newberry County Court of Common Pleas against Curtis Kent Ouellette, Quality Haulers, Inc., Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc. ("Oliver Action").

4. Additionally, Plaintiff Great West Casualty Company, as subrogee of U.S. Xpress, Inc., filed a Summons for Arbitration and Claim for Property damage in the Newberry County

Arbitration Panel against Kent Huntley Oliver and Thompson Construction Group, Inc. bearing Case No. 2023-CP-36-00125 ("Great West Action").

5. These actions all arise out of the same series of occurrences and involve common questions of law and fact.

6. Joining and consolidating these actions for discovery and trial would promote judicial economy, avoid unnecessary cost and delay, and prevent potential inconsistent verdicts.

7. Defendants respectfully request that the Court issue an Order Granting Permissive Joinder and Consolidation of the Cozby Action, the Arender Action, and the Oliver Action under Case No. 2022-CP-43-01006, the number assigned to the Cozby Action, for the purposes of discovery and trial.

8. Defendants reserve the right to join and consolidate the Great West Action with these other matters when it is appropriate to do so, including but not limited to after any appeal of the arbitrator's decision pursuant to S.C. Code Ann. § 38-77-770.

The undersigned counsel for Defendants hereby affirms that, upon information and belief, consultation pursuant to Rule 11, SCRCP, would serve no useful purpose.

This Motion is supported by the pleadings, applicable law, the arguments of counsel for Defendants, and any accompanying documents that may be submitted to the Court prior to or during the hearing on this Motion.

[*Signature Page to Follow*]

SMITH | ROBINSON
Smith Robinson Holler DuBose and Morgan, LLC

s/ G. Murrell Smith, Jr.
G. Murrell Smith, Jr. SC Bar #66263
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Sumter, SC 29151
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Attorneys for Defendants Kent Huntley Oliver and Thompson Construction Group, Inc.

Sumter, South Carolina

August 18, 2023

RECEIVED
Jun 13 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Kirk Griffin, Circuit Court Judge

Appellate Case No.: 2024-000742

Jerry Cozby — Plaintiff,

vs.

Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Ouellette, and Quality Haulers, Inc. — Defendants,
of which,
Kent Huntley Oliver and Thompson Construction Group, Inc. are — Respondents,

AND

Dean Alan Arender and Tamala Arender, — Appellants,

vs.

Kent Huntley Oliver, Thompson Construction Group, Inc. Curtis Kent Ouellette, and DMX Transportation Services, Inc. — Defendants,
of which
Kent Huntley Oliver and Thompson Construction Group, Inc. are — Respondents,

AND

Kent Huntley Oliver, — Respondent,

vs.

Curtis Kent Ouellette, Quality Haulers, Inc., Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc., Defendants, — Defendants,
of which
Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc. are — Appellants,

---

Certificate of Service

The undersigned hereby certifies that on June 13, 2024, he served all counsel of record the Appellants, Dean and Tamala Arender's, Return to the Respondents' Motion to Dismiss by emailing counsel a copy of the same to the below email addresses as maintained in the attorney information system:

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Enclosed with this Certificate of Service is a copy of the transmittal email to counsel.

Respectfully Submitted,

s/ James D. George, Jr.
James D. George, Jr.
Smith, Born, Leventis, Taylor & Vega, LLC
2801 Devine Street, Suite 300
Columbia, SC 29205
PH: (803) 509-5837

June 13, 2024

From: **James D. George Jr.** JGeorge@sbltv.law
Subject: Arender et. al. v. Oliver and Thompson Construction et. al. Appellate Case No. 2024-000742 Return
Date: June 13, 2024 at 11:30 AM
To: Andrew.evans@hawklaw.com, IveyFranklin@thejeffcoatfirm.com, justin.arenas@derricklawfirm.com, Joe Camerlengo jvc@truckcrashlaw.com, JLL@truckcrashlaw.com, fred.hanna@smithrobinsonlaw.com, Murrell Smith murrell@smithrobinsonlaw.com, cott@gwblawfirm.com, Hood Dawson hdawson@gwblawfirm.com, Mark S. Barrow msb@swblaw.com, Marshall C. Crane MCC@swblaw.com, Madison K. Kea MKK@swblaw.com
Cc: Jacob Born JBorn@sbltv.law, Virginia Kendall vkendall@sbltv.law, Jim Sproat jsproat@sbltv.law, Erica Ricano ERicano@sbltv.law, Latonya M. Smalls lsmalls@sbltv.law, ebehymer@gwblawfirm.com, Jennifer Lisandrelli jennifer.lisandrelli@smithrobinsonlaw.com, James D. George Jr. JGeorge@sbltv.law

Good morning,

Attached please find Appellants Dean and Tamala Arender's Return to the Motion to the Dismiss filed by Respondents. Also attached are the cover letter, certificate of services, and exhibits accompanying that Return. These materials will be uploaded to the court of appeal's OneDrive account momentarily.

Best,

JDG

Jamie George
Attorney
Smith, Born, Leventis, Taylor & Vega
(803) 509-5837
jgeorge@sbltv.law

Return to Motion Dismiss Appeal JDG 6.13.24.pdf

Ex 1 Transcript.pdf

Ex 2 Order.pdf

Ex 3 Motion.pdf
249 KB

COS Return to Motion to Dismiss 6.13.24.pdf
96 KB

Cover Letter Return to Motion to Dismiss 6.13.24.pdf

William L. Smith, II
C. Daniel Vega
Jacob D. Born
Peter P. Leventis, IV
George A. Taylor
James C. Sproat
James D. George
R. Lawton Harper

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June 13, 2024

Via OneDrive
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Jerry Cozby, Plaintiff vs. Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Ouellette, and Quality Haulers, Inc., Defendants, of which Kent Huntley Oliver and Thompson Construction Group, Inc., are Respondents. AND Deal Alan Arender and Tamala Arender, Appellants vs. Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Kent Ouellette, and DMX Transportation Services, Inc., Defendants, of which Kent Huntley Oliver and Thompson Construction Group, Inc. are Respondents. AND Kent Huntley Oliver, Respondent vs. Curtis Kent Ouellette, Quality Haulers, Inc. Dean Alan Arender, US XPRESS Leasing, Inc., and US EXPRESS, Inc., Defendants, of which Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc., are Appellants.
Appellate Case No.: 2024-000742
Return to Motion to Dismiss

Dear Ms. Kitchings:

Enclosed please find the following for filing in the above referenced matter:

1. Appellants Dean and Tamala Arender's—in their capacities as Plaintiff/ Appellants in the action of Dean Alan Arender and Tamala Arender vs. Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Kent Ouellette, and DMX Transportation Services, Inc.—Return to the Motion to Dismiss filed by Thompson Construction Group, Inc. and Kent Huntley Oliver;

2. Certificate of Service.

Thank you for your assistance in this matter.

Very truly yours,

s/ James D. George, Jr.
James David George, Jr.
Jacob D. Born
Attorneys for the Appellants

cc: Andrew Clifton Evans
Ivey Blair Franklin
Raia J. Hirsch
Frederick Newman Hanna, Jr.
G. Murrell Smith, Jr.
Justin Joaquin Arena
Joseph V. Camerlengo
Jessica L. Lanifero
Edward Hood Dawson, III
Curtis Lyman Ott
Mark Steven Barrow
Marshall Collin Crane
Madison Claire Killen