THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable 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 Huntly 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,

of which Dean Alan Arender, US Xpress Leasing, Inc., and US Xpress, Inc., are Appellants.

RETURN TO MOTION TO DISMISS

Pursuant to Rule 240 of the *South Carolina Appellate Court Rules*, Appellants Dean Alan Arender, US Xpress Leasing, Inc., and US Xpress, Inc. (hereinafter "Appellants"), by and through the undersigned counsel, hereby submit this Return to Respondents Kent Huntley Oliver and Thompson Construction Group, Inc.'s Motion to Dismiss.

PROCEDURAL HISTORY

This matter arises from a multi-vehicle accident that occurred on Interstate 26 in Newberry County on November 12, 2020. Following the accident, four lawsuits were filed, three of which are relevant to this appeal. The first lawsuit was filed on June 24, 2022, by Jerry Cozby in Sumter County, bearing Case No. 2022-CP-43-01006 (hereinafter "Cozby Action"). The Cozby Action named the following Defendants: Kent Huntley Oliver; Thompson Construction Group, Inc.; Curtis Ouellette; and DMX Transportation, Inc. On July 26, 2022, an Amended Complaint was filed, replacing DMX Transportation, Inc. with Quality Haulers, Inc. Therefore, the Cozby Action, prior to joinder, named the following Defendants: Kent Huntley Oliver; Thompson Construction Group, Inc.; Curtis Ouellette; and Quality Haulers, Inc.

The second lawsuit was filed on May 17, 2023, by Dean Arender and Tamala Arender in Newberry County, bearing Case No. 2023-CP-36-00276 (hereinafter "Arender Action"). The Arender Action named the following Defendants: Kent Huntley Oliver; Thompson Construction Group, Inc; Curtis Kent Ovellette; and DMX Transportation Services Inc. On November 9, 2023, the Third Amended Complaint was filed, adding Quality Haulers, Inc. as a Defendant. Therefore, the Arender Action, prior to joinder, named the following Defendants: Kent Huntley Oliver;

Thompson Construction Group, Inc; Curtis Kent Ouellette; Quality Haulers, Inc.; and DMX Transportation Services Inc.

The third lawsuit was filed on June 2, 2023, by Kent Huntley Oliver in Newberry County, bearing Case No. 2023-CP-36-00300 (hereinafter "Oliver Action"). The Oliver Action named the following Defendants: Curtis Kent Ouellette; Quality Haulers, Inc.; Dean Arender; U.S. XPRESS Leasing, Inc; and U.S. XPRESS, Inc.

On August 18, 2023, Thompson Construction Group, Inc. (hereinafter "Thompson") and Kent Huntley Oliver (hereinafter "Oliver") filed a Motion for Permissive Joinder and Consolidation. The Circuit Court conducted a hearing on the motion on October 9, 2023. On February 13, 2024, the Circuit Court entered an Order granting Thompson and Oliver's Motion for Permissive Joinder in the Cozby Action. As a result of the Order, the three lawsuits were joined as one action in Sumter County, bearing Case No. 2022-CP-43-01006.

USX and Arender, as Defendants, as well as the Arenders, as Plaintiffs, filed separate Motions to Reconsider on February 23, 2024. The Court denied the motions on April 4, 2024. USX and Arender, as Defendants, as well as the Arenders, as Plaintiffs, filed Notices of Appeal on May 3, 2024, appealing both the Order granting the Motion for Joinder and Order denying the Motions to Reconsider. On May 16, 2024, the Court issued a letter consolidating the appeals under Appellate Case No. 2024-000742. Respondents filed their Motion to Dismiss on May 28, 2024.

APPEALABILITY STANDARD

"The determination of whether a trial court's order is immediately appealable is governed by statute." *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 537, 773 S.E.2d 144, 145 (2015). The appellate courts shall review the following on appeal:

> (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 …

See S.C. Code Ann. § 14-3-330. An appellate court's "review of trial court orders is not constrained by how the order is styled." *Morrow*, 412 S.C. at 539, 773 S.E.2d at 147; *see also Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct.App.2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability."). "By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis." *Id*. at 538, 773 S.E.2d at 146.

ARGUMENT[1]

I. The Order Granting Permissive Joinder and Order Denying the Motions to Reconsider are Immediately Appealable Because They Affect Substantial Rights of the Appellants.

To appeal an intermediate order under S.C. Code Ann. § 14-3-330(2)(a), the order must (1) affect a substantial right and (2) determine the action and prevent a judgment from which an appeal might be taken.

a. The Plaintiff's Right to Election is a Substantial Right.

In *Neeltec Enterprises, Inc. v. Long*, the South Carolina Supreme Court held that "[t]he right of the plaintiff to choose her defendant is a substantial right within the meaning of [Section 14-3-330(2)]" when determining whether an order substituting defendants was immediately appealable, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012). In analyzing the appealability, the

[1] Appellants agree that the Order Granting Permissive Joinder and Order Denying the Motion to Reconsider are not final orders; therefore, Appellants will not address this argument. Moreover, Appellants are not addressing any venue arguments in their appeal as any arguments pertaining to venue are not immediately appealable. *See Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000).

Court looked to *Watts v. Copeland*, 170 S.C. 449, 170 S.E. 780 (1933). In *Watts*, the Court addressed an appeal from an order substituting parties after judgment and held:

> [F]rom the court's order no appeal was taken by [the defendant]. On the contrary, as stated, she elected to file an answer and go to trial on the issues made by the pleadings. Clearly, in these circumstances, the question here made is res adjudicata. [Defendant], by her failure to appeal from the court's order of substitution, is now estopped to deny that [the individual] was the proper party to prosecute the action.

170 S.C. at 456-57, 170 S.E. at 783. The Court in *Neeltec* therefore concluded that an "order of substitution is appealable under § 14-3-330(2)(a), and that the failure to take such an immediate appeal would bar consideration of the order in an appeal from final judgment," 397 S.C. at 567, 725 S.E.2d at 928-29.

First, an order granting permissive joinder involves the same principles addressed in *Neeltec* and *Watts* as both orders interfere with the plaintiff's right to election. This right "has been recognized in South Carolina jurisprudence for almost two hundred years." *Smith v. Tiffany*, 419 S.C. 548, 563, 799 S.E.2d 479, 487 (2017) (citing *Little v. Robert G. Lassiter & Co.*, 156 S.C. 286, 287, 153 S.E. 128, 128 (1930)). A plaintiff "should not be required to sue someone against whom [he] makes no claim." *Id.* It is the plaintiff's choice, and as such, South Carolina courts have "offered various reasons for refusing to allow defendants to bring in alleged joint tortfeasors a plaintiff has opted not to sue." *Id.* at 562, 799 S.E.2d at 487.

Here, the Order forces a Plaintiff to sue someone against whom he makes no claim. The Order states, "Arender and U.S. Xpress' negligence is also at issue in the Cozby Action…" *See* Exhibit A, Page 7. If Cozby had an interest in determining Arender and USX's negligence, then he should have alleged claims against Arender and USX directly. Moreover, if Cozby wanted to make a motion to amend his pleadings to add claims against Arender and USX, then he should have. However, Cozby took neither of these actions. Additionally, if Respondents were

concerned with Arender and USX's negligence in the Cozby Action, they could have asserted third-party claims. It is not the Court's responsibility or right to manufacture this scenario—it is the parties in their pleadings.

Second, if Appellants decided to not appeal the Order Granting Permissive Joinder until after judgment, the question on appeal would be res adjudicata because any trial would determine whether Appellants were proper parties in the joined action, similar to the defendant in *Watts*. As one joined action, a factfinder will determine whether USX and Arender were negligent even though Cozby never named them as Defendants or brought any claims or made any allegations against them.

Therefore, this matter is immediately appealable under S.C. Code Ann. § 14-3-330(2)(a) because the Plaintiff's right of election is a substantial right and the failure to immediately appeal the Orders would bar consideration of the orders in an appeal from final judgment.

b. The Appellants' Right to a Particular Mode of Trial is a Substantial Right.

"[T]he denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14–3–330(2)." *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) (citing *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000)). "These cases not only permit, but indeed require, immediate appeal in the event of denial of a mode of trial to which one is entitled as a matter of right." *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333.

Under South Carolina law, "[t]he exclusivity provision of the [Workers' Compensation] Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 224, 661 S.E.2d 395, 403 (Ct. App. 2008). At the time of the incident, Arender was driving for USX, Oliver was driving for Thompson, and Curtis Oullette was driving for Quality Haulers,

Inc. Prior to joinder, neither Oliver nor Arender maintained tort actions against their employers due to the Workers' Compensation Exclusivity Doctrine. However, now that the parties are joined into one action, Arender is a Plaintiff and USX is a Defendant, running afoul to the Workers' Compensation Exclusivity Doctrine; the same issue arises between Oliver and Thompson.

First, USX is entitled to a specific mode of trial in which their employee cannot maintain a tort action against them. However, this right to a particular mode of trial is denied as Arender is a Plaintiff and USX is a Defendant in the same action. Second, as discussed above, if Appellants decided to not appeal the Orders until after judgment, the question on appeal would be res adjudicata because any trial would determine whether Appellants were proper parties in the joined action.

Therefore, this matter is immediately appealable under S.C. Code Ann. § 14-3-330(2)(a) because the Orders deny Appellants' right to a particular mode of trial and the failure to immediately appeal the Orders would bar consideration of the orders in an appeal from final judgment.

II. The Order Granting Permissive Joinder and Order Denying the Motions to Reconsider are Immediately Appealable Because They Involve the Merits of the Action.

A party may file an immediate appeal when an order involves the merits of the action. *See* S.C. Code Ann. § 14-3-330(1). An order involves the merits when it "finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense." *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). South Carolina courts have never determined whether an order granting joinder involves the merits of an action. However, when South Carolina courts are faced with determining whether an order is immediately appealable, they may look to and adopt the reasoning of other jurisdictions

that have addressed the appealability of specific orders. *See Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005).

In *Wosepka v. Dukart*, the Supreme Court of North Dakota addressed whether an order granting joinder under Rule 19 of the *North Dakota Rules of Civil Procedure*[2] was immediately appealable, 160 N.W.2d 217 (N.D. 1968). In this case, Plaintiff's son was driving Plaintiff's car when it collided with Defendant's truck. *See id.* at 217. Defendant asserted that Plaintiff's son's negligence was the proximate cause of the accident. *See id.* The trial court, therefore, compelled joinder under Rule 19 of the *North Dakota Rules of Civil Procedure* because Plaintiff's son "ought to be a party in order to accord complete relief between those who were already parties." *Id.* at 218. In determining whether the grant of joinder was immediately appealable, the Court looked to whether the order involved the merits of the action. *See id.* The North Dakota Supreme Court held that an order granting a motion to force joinder was an order that involves the merits of an action and was, therefore, appealable pursuant to N.D. Cent. Code Ann. § 28-27-02(5)[3]. *See id.* at 217.

The Court, in this case, is faced with a similar question—whether the order granting permissive joinder under Rule 20 of the *South Carolina Rules of Civil Procedure* involves the merits of the action and is, therefore, appealable. Although the *Wosepka* case involves a different joinder rule, permissive joinder under Rule 20, SCRCP and compulsory joinder under Rule 19, SCRCP both result in the joinder of parties in one action.

[2] Rule 19 of the *North Dakota Rules of Civil Procedure* and Rule 19 of the *South Carolina Rules of Civil Procedure* mirror one another.

[3] N.D. Cent. Code Ann. § 28-27-02(5) provides that "[a]n order which involves the merits of an action or some part thereof" is an order that "may be carried to the supreme court," which is notably similar to S.C. Code Ann. § 14-4-330(1) ("The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal … [a]ny intermediate … order … in a law case involving the merits in actions…")

Here, the Order Granting Permissive Joinder and the Order Denying the Motion to Reconsider involve the merits of the action because the Orders failed to identify if the parties are joined as Plaintiffs or as Defendants, resulting in a lack an understanding of how the claims are proceeding. 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). However, the joinder of these three separate actions does not constitute a situation where persons are simply joining as plaintiffs or defendants; this is evidenced by the case caption in the Circuit Court's Orders. *See* Exhibit A and B. The case caption shows that there are three separate actions as if they were consolidated; the only difference following the grant of joinder is that there is only one case number. *See id.* The orders fail to identify how the parties are joined and how the various claims work together in one action.

For example, a joined action has only one verdict form. *See Sarvghad v. Sitton Buick Co.*, 312 S.C. 429, 430, 440 S.E.2d 894, 895 (Ct. App. 1994). If there is only one verdict form, the factfinder must "apportion one-hundred percent of the fault between the plaintiff and each defendant whose actions are the proximate cause of the indivisible injury." *Smith v. Tiffany*, 419 S.C. 548, 553, 799 S.E.2d 479, 481 (2017) (citing S.C. Code Ann. § 15-38-15(C)(3)). "[A] plain reading of the words 'defendant' and 'defendants' in section 15-38-15(C) reveals the legislature's intent to allow only a 'defendant' or 'defendants' to be listed on the jury form and included in the allocation of fault." *Id.* at 559–60, 799 S.E.2d at 485.

First, the convoluted nature of this verdict form, the questions, and the various parties will be difficult to draft and understand as there is not a clear understanding of how the claims operate as one joined case. Second, Cozby has not alleged any causes of action against Defendant Arender or USX; therefore, it would be improper under South Carolina statutory law

to include these Defendants on the verdict form with Plaintiff Cozby as there are no claims pending against them. Lastly, as referenced above, Arender cannot pursue a tort claim against USX and, therefore, cannot be on the same verdict form as Plaintiff Arender and Defendant USX; the same can be said for Plaintiff Oliver and Defendant Thompson.

Lastly, the Order Granting Permissive Joinder and the Order Denying the Motion to Reconsider involve the merits of the action by interfering with the Plaintiff's right of election and the Workers Compensation exclusivity doctrine for the reasons stated above. Therefore, the Circuit Court's Orders affect the merits of the action and are, therefore, immediately appealable pursuant to S.C. Code Ann. § 14-3-330(1).

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Court deny Respondents' Motion Dismiss.[4]

Respectfully submitted,

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[4] Appellants also incorporate by reference the arguments included in the Return filed by counsel for Dean Arender and Tamala Arender.