

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2024-0002719

STEPHANIE KOZAK,
(Personal Representative of the Estate of John Witkowski)

Appellant,

vs.

CHRIS CUTWAY,

Respondent.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities
Statement of Issues on Appeal
Statement of the Case
Standard of Review
Arguments
 I. THE ORDER DISMISSING THE APPELLANT’S ACTION IS VOID AS A
 MATTER OF LAW.
 II. THE APPELLANT IS A PROPER PARTY UNDER RULE 17, S.C.R.C.P.
 III. THE APPELLANT AS DESIGNATED IS AT MOST MISJOINED AND ENTITLED TO
 RELIEF.
CONCLUSION

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA

Cosgrove v. Butler, 1 S.C. 241 (1869)

Demian v. S.C. Health & Human Servs. Fin. Comm'n,
297 S.C. 1, 374 S.E.2d 510 (Ct. App. 1988)

Farmer v. CAGC Ins. Co., 424 S.C. 579, 819 S.E.2d 142 (Ct.App. 2018)

Genobles v. West, 23 S.C. 154 (1885)

IN RE Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997)

Petroleum Transportation Inc. v. SCPSC, 255 S.C. 419, 179 S.E.2d 326, 329 (1971)

Piana v. Piana, 239 S.C. 367, 123 S.E.2d 297 (1961)

Roberson v. Southern Finance of SC, Inc., 365 S.C. 6, 615 S.E.2d 112 (2005)

Ross v. Richland Co., 270 S.C. 100, 240 S.E.2d 649 (1978)

Stark Truss Co. v. Superior Const. Corp., 360 S.C. 503, 602 S.E.2d 99 (Ct.App. 2004)

Thompson [v. Hammond], 299 S.C. at 119, 382 S.E.2d at 902-903

Thomas & Howard Co., Inc. v. T.W. Graham and Co.,
318 S.C. 286, 457 S.E.2d 340, 343 (1995)

RULES: SOUTH CAROLINA

Rule 17, S.C.R.C.P.

Rule 20(a), S.C.R.C.P.

Rule 21, S.C.R.C.P.

Rule 60(b)(4), S.C.R.C.P.

CASES: FEDERAL

DirectTV, Inc. v. Leto, 467 F.3d 842, 844 (3d Cir. 2006)

CASES: ALABAMA

Liberty Nat'l Life Ins. Co. v. Univ. of Alabama Serv. Found.,
881 So.2d 1013 (Ala. 2003)

CASES: CALIFORNIA

Stoltenberg v. Newman, 179 Cal.App.4th 287, 101 Cal.Rptr.3d 606 (Cal.App. 2009)

CASES: NEW JERSEY

Mears v. Economy Brake Service, Inc.,

188 A.2d 207, 78 N.J.Super. 218 (N.J. Super. App. Div. 1963)

CASES: OKLAHOMA

Wagoner v. Saunier, 627 P.2d 428, 1981 OK 17 (Okla. 1981)\

CASES: TENNESSEE

Grantham v. Jackson-Madison County Genl. Hosp. Dist., 954 S.W.2d 36 (Tenn. 1997)

CASES: TEXAS

Sixth RMA Partners, L.P. v. Sibley, 111 S.W.3d 46 (Tex. 2003)

OTHER AUTHORITIES:

46 AM.JUR.2D *Judgments* § 31 (1994)

7 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1683 (3d ed.)

STATEMENT OF ISSUES ON APPEAL

- I. THE ORDER DISMISSING THE APPELLANT'S ACTION IS VOID AS A MATTER OF LAW.
- II. THE APPELLANT IS A PROPER PARTY UNDER RULE 17, S.C.R.C.P.
- III. THE APPELLANT AS DESIGNATED IS AT MOST MISJOINED AND ENTITLED TO RELIEF.

STATEMENT OF THE CASE

Appellant KOZAK filed her Complaint, as Personal Representative for her son Witkowski, for damages against the Respondent CUTWAY on April 20, 2022. On May 21, 2022, CUTWAY filed his Answer and Counterclaim in response to the Complaint.

Former counsel for KOZAK failed to timely file a response. On June 23, 2022, the Respondent CUTWAY filed a default on the failure of KOZAK to respond to the Answer and Counterclaim. This was followed with a Motion for Default Judgment on June 29, 2023.

In response to the Motion of KOZAK's counsel, the Court refused to set aside the default by its Order of August 22, 2022. This was confirmed after a Motion to Reconsider by Order filed October 5, 2022.

By Order and Final Judgment filed November 15, 2022, the Court entered default judgment for the Respondent CUTWAY. This Order purports to recite a dismissal of the entire action.

Nothing in the procedural history of the case recites grounds or a basis to dismiss the Appellant's original Complaint or the relief sought thereby. Lacking a procedural basis, and lacking grounds, the Appellant filed her Rule 60 Motion to declare the Order dismissing the Complaint herein void.

STANDARD OF REVIEW

In *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 602 S.E.2d 99 (Ct.App. 2004), the Court of Appeals dealt with the validity of a default judgment. That Court held, in relevant part:

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. . . . This decision will not be reversed absent an abuse of that discretion. *Thompson [v. Hammond]*, 299 S.C. at 119, 382 S.E.2d at 902-903; *In Re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997).

An abuse of discretion occurs when the order was controlled by an error of law or when the order is without evidentiary support. *Id.*

[*Id.*, 360 S.C. at 508, 602 S.E.2d at ___; matter in brackets added.]

The Appellant contends the Circuit Court's Order of November 15, 2022 is based upon a clear error of law.

ARGUMENT

I. THE ORDER DISMISSING THE APPELLANT'S ACTION IS VOID AS A MATTER OF LAW.

In discussing the meaning of a void judgment, our Supreme Court has held as follows:

A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely "voidable." 46 AM.JUR.2D *Judgments* § 31 (1994). Generally, a judgment is void only if a court acts without jurisdiction. *Ross v. Richland Co.*, 270 S.C. 100, 240 S.E.2d 649 (1978). Irregularities which do not involve jurisdiction do not render a judgment void. *Genobles v. West*, 23 S.C. 154 (1885). There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal. *Piana v. Piana*, 239 S.C. 367, 123 S.E.2d 297 (1961). *SEE ALSO Petroleum Transportation Inc. v. SCPSC*, 255 S.C. 419, 179 S.E.2d 326, 329 (1971). A judgment will not be vacated for a mere irregularity which does not affect the justice of the case, and of which the party could have availed himself, but did not do so until judgment was rendered against him. *Cosgrove v. Butler*, 1 S.C. 241 (1869).

[*Thomas & Howard Co., Inc. v. T.W. Graham and Co.*, 318 S.C. 286, ___, 457 S.E.2d 340, 343 (1995); formatting added.]

The facts disclosed by the record, and the reasonable inferences thereof, show that the judgment is void, as defined by Rule 60(b)(4), S.C.R.C.P.

As in the *Thomas & Howard* case, *supra*, the Circuit Court cannot issue an Order when the issue in question is not before it. The dismissal of the Appellant's Complaint was never noticed as an issue, nor argued before the Circuit Court. [RECORD ON APPEAL, p.___] The Court

lacked jurisdiction to issue an Order ending the entire case.

The facts here are foursquare with those of *Roberson v. Southern Finance of SC, Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005). Failure to give notice of hearing to dismiss the Appellant's case in chief renders the judgment of the Circuit Court on November 15, 2022 void.

II. THE APPELLANT IS A PROPER PARTY UNDER RULE 17, S.C.R.C.P.

The Circuit Court's Order of November 15, 2022 made no specific findings of fact or conclusions of law. At the hearing on the Appellant's Rule 60 Motion, counsel for Respondent argued that the Appellant was not entitled to relief under Rule 17, S.C.R.C.P. [RECORD ON APPEAL, p.____.] This argument was based on the closing of the Estate of Witkowski, and the cessation of the Appellant's status as the Personal Representative of that estate.

On the basis of this procedural history, the Appellant responds to this argument as an, 954 S.W.2d 36 (Tenn. 1997); *Wagoner v. Saunier*, 627 P.2d 428, 1981 OK 17 (Okla. 1981); *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46 (Tex. 2003); *Mears v. Economy Brake Service, Inc.*, 188 A.2d 207, 78 N.J.Super. 218 (N.J. Super. App. Div. 1963); *Stoltenberg v. Newman*, 179 Cal.App.4th 287, 101 Cal.Rptr.3d 606 (Cal.App. 2009); *Liberty Nat'l Life Ins. Co. v. Univ. of Alabama Serv. Found.*, 881 So.2d 1013 (Ala. 2003).

III. THE APPELLANT AS DESIGNATED IS AT MOST MISJOINED AND ENTITLED TO RELIEF.

Rule 21, S.C.R.C.P. provides: *Demian [v. S.C. Health & Human Servs. Fin. Comm'n]*, 297 S.C. [1,] at 6, 374 S.E.2d 510, 512 [(Ct. App. 1988)

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately. additional sustaining ground.

At hearing, counsel for Appellant argued, and the Respondent did not contest, that the Appellant is the sole heir to Witkowski. [RECORD ON APPEAL, p.____.]

The precedent developed under Rule 17 by the States makes it clear that Rule 17's requirement that the litigant be a real party in interest goes to the party's rights, and not to how the party is designated. See *Grantham v. Jackson-Madison County Genl. Hosp. Dist.*, 954 S.W.2d

36 (Tenn. 1997); *Wagoner v. Saunier*, 627 P.2d 428, 1981 OK 17 (Okla. 1981); *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46 (Tex. 2003); *Mears v. Economy Brake Service, Inc.*, 188 A.2d 207, 78 N.J.Super. 218 (N.J. Super. App. Div. 1963); *Stoltenberg v. Newman*, 179 Cal.App.4th 287, 101 Cal.Rptr.3d 606 (Cal.App. 2009); *Liberty Nat'l Life Ins. Co. v. Univ. of Alabama Serv. Found.*, 881 So.2d 1013 (Ala. 2003).

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The Court of Appeals defined misjoinder in *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct.App. 2018):

Although Rule 21 does not define misjoinder, "[t]he cases make it clear that parties are misjoined when they fail to satisfy either of the preconditions for permissive joinder of parties set forth in Rule 20(a)." 7 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1683 (3d ed.). As to joining parties as defendants, Rule 20(a), SCRCPP, states:

"All persons may be joined in one action as defendants if there is asserted against them ... any right to relief in respect of or arising out of the same transaction, occurrence ... and if any question of law or fact common to all defendants will arise in the action." Misjoinder therefore "occurs when there is no common question of law or fact or when ... the events that give rise to the plaintiff's claims against defendants do not stem from the same transaction." *DirecTV, Inc. v. Leto*, 467 F.3d 842, 844 (3d Cir. 2006) ; see also *Demian [v. S.C. Health & Human Servs. Fin. Comm'n]*, 297 S.C. [1,] at 6, 374 S.E.2d 510, 512 [(Ct. App. 1988)] (finding no abuse of discretion when the circuit court denied a defendant's motion to be dismissed for misjoinder when a common question of law applied to all defendants).

[*Id.*, 424 S.C. at 586, 819 S.E.2d at 146-147; paragraphing added.]

While the Court's discussion involves a defendant, the intent is clear: to claim misjoinder, there must be no common question of law or fact, or where the events giving rise to a Plaintiff's claims do not arise from the same transaction. Both tests are satisfied here: the individual Appellant's claims arise from a common question of law and fact with the Respondent. The claims of the Appellant, as asserted below, arose, as heir to the Estate, from the same transaction asserted here. The Appellant was not misjoined.

The Appellant would further note the specific language of Rule 21 cited above:

"Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

Had the Circuit Court specifically ruled that a misjoinder had occurred, either Appellant or the Court itself would have the duty to raise this issue and deal with the same. The Appellant further notes that the allowance of correction "at any stage of the action" would allow such correction, if necessary, even during this Appeal. The Appellant maintains such a correction, if required, is certainly compelled by equity.

CONCLUSION

The Respondent did not move to dismiss the Appellant's Complaint. No Notice of the hearing that resulted in the dismissal of that Complaint appears in the record. The question of dismissal of the Appellant's Complaint was never before the Circuit Court. No basis exists to dismiss the Appellant's Complaint. The Order of November 22, 2022 dismissing the Appellant's Complaint is void.

The grounds advanced at hearing pursuant to Rule 17, S.C.R.C.P. are without merit for the reasons stated.

The Appellant is entitled to an Order reinstating her Complaint.

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July 22, 2024

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