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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

Ct. App. Case No. 2023-001118
Civil Case No.: 2021-CP-18-01400

Josue Pineda Orellana…….....Plaintiff /*Appellant*,

v.

John Doe 1-10; Immaculate Reflections, Inc.; Banks Construction Company; Keller North America, Inc., f/k/a Hayward Banker, Inc.; Cooper River Concrete, LLC; Anchor Restoration Contractors, LLC; SC Steel, LLC f/k/a SMI-Owen Steel Company, Inc.; Enloe, Inc.; Ashley Steel, Inc.; Martin Murray Installation LLC; Low Country Case & Millwork, Inc.; Advanced Exterior Systems, LLC; R.W. Ford Company, Inc.; Therm-All, Inc.; Meritage Asset Management, Inc., d/d/a Century Glass; Lowcountry Doors & Hardware, Inc.; Polished Concrete Professionals of America, Inc.; Summit Industrial Maintenance, Inc., d/b/a Summit Industrial Flooring; Vulcan Steel Structures, Inc.; All Steel Construction, Inc.; All Plumbing Company, LLC; Design Build Mechanical Corporation; Delta Industrial Electric Company, Defendants,

Of which Trident Construction, LLC is ……Defendant/*Respondent*.

RESPONDENT'S INITIAL BRIEF

EPTING & RANNIK, LLC

This 29th day of July, 2024
Charleston, South Carolina

/s/ Jaan Rannik
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3. Whether the trial court erred in the Worker's Compensation exclusivity defense bars any further claim by Appellant against Respondent Trident Construction, LLC, a statutory employer.
4. Whether the trial court erred in holding that the *Keene* case—concerning whether a property owner is a "statutory employer" (subject to S.C. Code § 42-1-400) for purposes of the Worker's Compensation exclusivity defense—did not alter the statutory employer status of Respondent Trident Construction, LLC, who is not a property owner but rather a general contractor (subject to S.C. Code § 42-1-410).
5. Whether the trial court erred in holding that Trident Construction, LLC's dismissal with prejudice from a claim brought against it in the Worker's Compensation Commission barred a claim against Trident Construction, LLC in this action.
6. Whether the trial court erred in holding the statute of limitations had expired with regard to any claim against Trident Construction, LLC.
7. Whether the trial court erred in finding that the failure to name Trident Construction, LLC in the original complaint was not due to a "mistake" as to Trident Construction, LLC's identity.
8. Whether the trial court erred in finding that the statute of limitations as to Trident Construction, LLC was not subject to equitable tolling.
9. Whether the trial court erred in finding Trident Construction, LLC would be prejudiced by being added to a suit weeks before the suit is set for trial.

STATEMENT OF THE CASE

I. Factual Background

Respondent Trident Construction, LLC ("Trident") was the general contractor hired by a commercial truck dealer and distributor, Worldwide Equipment, to build a new 37,000 square-foot facility at 780 Jedburg Road, Summerville, South Carolina ("the Project"). The construction was performed by various subcontractors or sub-subcontractors. Appellant Josue Pineda Orellana

("Mr. Pineda") was an employee of one sub-subcontractor, Frank's Painting LLC ("Frank's"), who was subcontracted by Peters Paint & Wall Covering ("Peters"), who Trident subcontracted.

On August 6, 2018, Mr. Pineda fell and was badly injured while working for Frank's at the Project. Plaintiff brought a Workers' Compensation claim against Frank's, Peters, and Trident, all of whom were Plaintiff's statutory employers for purposes of Workers' Compensation.

II. Procedural History

Mr. Pineda settled the Workers' Compensation claim, and Trident was dismissed by the consent of all parties. **R. p. xx** (Dismissal with Prejudice).

On August 5, 2021, the day before the statute of limitations expired for claims relating to his August 6, 2018 injury, Mr. Pineda filed the instant action in the Court of Common Pleas, naming as defendants myriad subcontractors and 10 "John Doe" defendants. **R. pp. xx-xx** (Summons & Complaint).

Twenty-two months later (and twenty-two months after the statute of limitations expired), Mr. Pineda filed a motion to amend the complaint and substitute Trident in place of John Doe #1. **R. pp. xx-xx** (Motion to Amend). On April 21, 2023, Trident moved to intervene for the limited purpose of opposing the amendment, on the grounds *inter alia* that (i) the amendment would prejudice Trident as the case was set for trial within one month of the hearing on the motion; (ii) the amendment was futile because Trident is a statutory employer and can only be sued in Worker's Compensation; (iii) Mr. Pineda *already had* sued Trident for this same incident in Worker's Compensation and had dismissed Trident with prejudice; (iv) any new claim against Trident was barred by the statute of limitations; and (v) the law in South Carolina regarding a general contractor's status as a statutory employer entitled to the worker's compensation exclusivity defense has not been altered. **R. pp. xx-xx** (Trident Memo in Support of Motion to Intervene).

Trident's Motion to Intervene and Mr. Pineda's Motion to Amend were both heard by the trial court on May 18, 2023, and the parties submitted memoranda detailing their respective positions thereafter. **R. pp. xx-xx**; **xx-xx** (Parties' Memoranda). The trial court permitted Trident's limited intervention and denied Mr. Pineda's motion to amend by order of May 26, 2023. **R. p. x** (May 26 Order).

On June 5, 2023, Mr. Pineda filed a motion to reconsider (**R. p. xx-xx** (Motion to Reconsider)), but did not serve Trident. And, because Trident was not a party, it received no notice from the court, as was stated in the Notice of Electronic Filing ("NEF") that was filed on the record and sent to the parties. **R. p. xx** (NEF of Motion to Reconsider). The motion for reconsideration was denied by order of June 9, 2023, and this order was also not served on Trident. **R. p. xx** (June 9 Order).

Mr. Pineda noticed this appeal on July 10, 2023, and Trident received the notice via U.S. Mail on July 12, 2023. **R. p. xx** (Notice of Appeal). This was the first time Trident received notice of the Motion for Reconsideration or the Order denying the same.

STANDARD OF REVIEW

Rulings of law by the trial court are reviewed by this Court de novo. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009) ("As to questions of law, this court's standard of review is de novo."). Any factual findings, express or implied, are reviewed for clear error. *See, e.g.*, *State v. Hillary*, 441 S.C. 239, 250, 892 S.E.2d 541, 546–47 (Ct. App. 2023). Questions about the appealability of an order pursuant to statute are reviewed de novo. *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012) ("Questions of statutory interpretation are questions of law, which are subject to de novo review and which we are free to decide without any deference to the court below."). This Court likewise determines for itself whether issues were properly

preserved for appeal, properly raised on appeal, or abandoned. *See, e.g.*, *Buist v. Buist*, 410 S.C. 569, 577, 766 S.E.2d 381, 385 (2014) (affirming Court of Appeals' finding that issue not preserved for appeal).

ARGUMENT

I. This Appeal Should Be Dismissed as Untimely.

Mr. Pineda did not serve a notice of appeal within 30 days of the entry of the Order he appeals from. And, because Trident was not timely served with the Motion to Reconsider, the Motion did not toll stay the 30-day period within which to appeal. Further, because Trident was not served *at all* with the Motion to Reconsider or the order resolving that motion,[1] the Motion is ineffective as to Trident and cannot extend the time within which to notice an appeal with Trident as the sole Respondent.

A. Legal Standards

In order for an appeal to be timely, notice of the appeal must be served on all Respondents within 30 days of the order appealed from. Rule 203(b)(1), S.C.A.C.R.; *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004) ("The notice of appeal in a case appealed from the Court of Common Pleas must be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment."). The requirement of timely service of a notice of appeal is jurisdictional, and this Court lacks jurisdiction over untimely appeals. *Elam*, 361 S.C. at 14–15, 602 S.E.2d at 775 ("The requirement of service of the notice of appeal is jurisdictional, *i.e.,* if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and

[1] And thus was without the opportunity to oppose the motion or make a record in the trial court regarding the same.

has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.").

A timely motion to reconsider under Rule 59(e), S.C.R.C.P. stays the time within which to appeal. Rule 59(f), S.C.R.C.P. Motions to reconsider, like all motions, are required to be served on all parties. Rule 5(a)(3), S.C.R.C.P. To be timely, 59(e) motions must "be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(e), S.C.R.C.P. An untimely motion to reconsider does not toll the time within which to appeal. *See Albertson v. Byfield*, Case No. 2019-000664, 2021 WL 1784829, at *1 (Ct. App. May 5, 2021) ("Because Mother's Rule 59(e) motion was untimely, the filing of that motion did not toll the time for Mother to serve the notice of appeal from the November 2018 orders.").

B. Because Mr. Pineda's Rule 59(e) Motion Was at Untimely and Ineffective as to Trident, and Because the Notice of Appeal Was Not Served Within 30 Days of the Order Appealed From, This Court Is Without Jurisdiction to Hear This Appeal.

The Order denying Mr. Pineda's Motion to Amend was entered on May 26, 2023, and Trident received electronic notice of the Order that same day. **R. p. xx** (NEF of Order). As noted above, Trident was never served with any motion to reconsider or order deciding the same. Then, on July 10, 2023—more than 30 days after the entry of the Order—Trident was served with a Notice of Appeal.

1. The Rule 59(e) Motion Was Untimely Because It Was Not Served Upon Trident Within Ten Days of the Order.

Before serving the notice, Mr. Pineda evidently *did* file a Motion to Reconsider the Order (filed June 5, 2023, denied on June 9, 2023). As Trident had been terminated as a party on May 26, 2023, it did not receive electronic notice through the court's e-filing system, as is apparent from the Notice of Electronic Filing ("NEF") associated with the Motion to Reconsider and

received by Mr. Pineda. **R. p. xx** (NEF of Motion to Reconsider). Despite being on notice that Trident had not been served electronically with the Motion, Mr. Pineda did not serve Trident by traditional means either. *See* **R. p. xx** (Affidavit of Angela Gross); **R. p. xx** (Emails between counsel regarding the lack of service on Trident dated July 14, 2023–August 1, 2023). Because Trident was not served with the Motion to Reconsider within 10 days of the Order as required by Rule 59(e), the Motion to Reconsider was untimely and did not toll the time within which to appeal.

2. Mr. Pineda's Failure to Ever Serve Trident Renders the Rule 59(e) Motion Ineffective as to Trident.

Further, the failure to *ever* serve a motion for reconsideration on Trident means the motion is without effect as to Trident:

> Clearly, failure to serve a particular party with a motion or order adverse to that party's rights would render it ineffective against that party.

Keowee Inv. Grp., LLC v. Pickens Cnty., No. 4002-UP-459, 2004 WL 6331837, at *4 (Ct. App. Aug. 30, 2004). It is undisputed that Trident was never served with the June 5, 2023 Motion to Reconsider, rendering it ineffective as to Trident, the only Respondent in this putative appeal. Because the Motion is ineffective as to Trident, it cannot serve to extend the time within which to notice an appeal with Trident as the only respondent. Accordingly, the time to serve notice of Mr. Pineda's appeal expired on June 26, 2023,[2] fourteen days before Trident was served with the notice.

Because the notice of appeal was not timely served, this Court lacks jurisdiction to hear the appeal. *See Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999) ("The failure to timely serve the notice of appeal divests this court of subject matter jurisdiction and

[2] Thirty days from May 26 would be June 25, which fell on a Sunday in 2023.

results in dismissal of the appeal." (internal quotation marks omitted)). The appeal must be dismissed.

II. There Is No Immediately Appealable Order.

By statute, for a non-final order to be immediately appealable, it must either "involve the merits" or "affect a substantial right." S.C. Code § 14-3-330. These requirements are narrowly construed by courts. *See Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) ("The provisions of Section 14-3-330, including subsection (2), have been narrowly construed . . . .").

This Court raised the question of appealability by letter to the parties of September 29, 2023, **R. p. xx** (Ct. App. Letter re Appealability), and requested briefing from Appellant. Appellant's argued that (i) the decision to deny the amendment "involves the merits" and is appealable pursuant to S.C. Code § 14-3-330(1); and (ii) that the order effectively struck Appellant's pleading, thereby affecting a substantial right, and is appealable pursuant to S.C. Code § 14–3–330(2). **R. pp. xx** (Appellant's Memo dated Oct. 11, 2023).

This Court permitted the appeal to proceed by Order of November 14, 2023, but did not finally rule on the question of appealability, stating "this order merely allows the appeal to proceed at this time and does not finally determine whether the underlying order is subject to immediate review." **R. pp. xx** (Nov. 14, 2023 Order at 1–2).

As discussed *infra*, neither of Appellant's contentions is meritorious, and this Court should dismiss this appeal as interlocutory.

A. Involving the Merits

"An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case." *Long v. Sealed Air Corp.*, 391 S.C.

483, 489, 706 S.E.2d 34, 37 (Ct. App. 2011) (citing *Hunt v. Whitt*, 366 S.C. 379, 387 (Ct. App. 2005)). Neither the order denying reconsideration nor the order denying the amendment "involves the merits," but rather involve (i) whether reconsideration was appropriate under Rules 52, 59, or 60 S.C.R.C.P., and (ii) whether the proposed amendment of the pleading was futile.

Appellant is still able to pursue his claims as pled against the named defendants, and the orders in question do not involve the merits of those claims or defenses thereto. *Thornton v. S.C. Elec. & Gas Corp*., 391 S.C. 297, 306–07, 705 S.E.2d 475, 480 (Ct. App. 2011) ("The Thorntons may still pursue their negligence claim as originally pled in their complaint. If the trial judge permits it in the exercise of discretion, they may introduce evidence that SCE & G violated the Mining Act and argue the alleged violations are evidence of negligence.").

Accordingly, the orders do not "involve the merits."

B. Affecting a Substantial Right

Appellant's sole argument with regard to how its substantial rights are affected is that the denial of the amendment effectively strikes its pleading. While an immediate appeal may lie of an order striking a pleading, the South Carolina Supreme Court has held that the denial of a motion to amend does not constitute the striking of a pleading:

> In *Jefferson* [. . .], this Court held that an order denying a party's motion to file a late answer was a not directly appealable. The Court reached this conclusion because the trial judge did not rule on the substantive contents of the answer, nor did the order strike a pleading, *but refused to allow its filing.* This case is similar, as the judge did not strike a pleading but refused to allow its filing. Petitioners have not "arrived at the end of the road" and will be able to appeal the decision after the trial is finished.

Baldwin Const. Co. v. Graham, 357 S.C. 227, 230, 593 S.E.2d 146, 147–48 (2004) (citations omitted) (citing *Jefferson v. Gene's Used Cars, Inc.,* 295 S.C. 317, 368 S.E.2d 456 (1988), *Mid–State Distributors, Inc. v. Century Importers, Inc.,* 310 S.C. 330, 426 S.E.2d 777 (1993).

Accordingly, this is not a basis for an immediate appeal either, and the appeal should be dismissed as interlocutory.

III. The Trial Court's Substantive Rulings Were Not Appealed.

The only order listed in Mr. Pineda's July 10, 2023 Notice of Appeal is the June 9, 2023 Order denying his Motion to Reconsider. **R. p. xx** (Notice of Appeal). His notice of appeal does not reference the trial court's May 26, 2023 order or the substantive rulings as set forth therein. Accordingly, he has not appealed those rulings, and the only question properly before this Court is whether Judge McFaddin misapplied Rule 52, 59, or 60, S.C.R.C.P. in denying reconsideration.

IV. Arguments Not Preserved or Abandoned.

As Appellant has made no argument to this Court that Judge McFaddin erred in his application of Rule 52, 59, or 60, S.C.R.C.P. in connection with his Motion to Reconsider, that question is not preserved.

Should this Court find that Mr. Pineda properly appealed Judge McFaddin's May 26, 2023 order, various of Appellant's arguments concerning that order were not sufficiently raised—either in the trial court, in this Court, or both—to be properly considered as part of this appeal, because he failed to present authority and supporting arguments for them. Simply citing a rule, or providing a formulaic recitation thereof, without advancing any argument as to why that rule should apply does not sufficiently raise an argument or preserve it for appeal. As the South Carolina Supreme Court stated:

> It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector.

Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (internal citations omitted)).

In order for an issue to be considered as having been "raised" to a court, authority must be presented and supporting arguments made. *Langehans v. Smith*, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001) (noting "it is error for the appellate court to consider issues not properly raised to it"); *First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue.").

Because Appellant failed to present authority and supporting arguments, the following contentions should be deemed (i) unpreserved for appeal and/or (ii) abandoned.

A. Relation Back

Appellant asserts, without discussion or citations to the record:

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

Amended Initial Brief at 5. As discussed below, a review of the referenced Memorandum which Appellant seeks to incorporate shows no, or insufficient, discussion of each element such that this issue is not preserved for appeal.

1. Same Conduct

Appellant's memorandum in the trial court contains the following heading:

> *b. The Claims Asserted in the Proposed Amended Pleading Arose Out of the Conduct and Occurrence Set Forth in the Original Pleadings.*

R. p. xx (Pineda Trial Court Memorandum at 6). There is no text following or explaining that heading, and no facts or authority proffered to demonstrate the truth of the assertion. It is simply a heading, quoting an element of the relation-back inquiry, followed by another, unrelated heading. This is insufficient to raise the issue to the trial court or preserve the argument for appeal.

2. Notice and Prejudice

Appellant states in his amended initial brief[3] as follows:

> As stated previously in Plaintiff's Motion to Amend Complaint and Substitute Defendant, Plaintiff would agree to a 40(j) dismissal of this claim in order to prevent Trident from being prejudiced.

Amended Initial Brief at 3. A review of the referenced motion reveals no such argument. *See* **R. p. xx-xx** (Pineda Trial Court Memorandum at 1-10).

Nor does Appellant explain in his Amended Initial Brief or to the trial court how a dismissal under Rule 40(j), S.C.R.C.P. would cure the prejudice to Trident. *See infra* Part V.C.2. Any grounds Appellant may have to dispute the existence of prejudice to Trident have been abandoned.

3. Mistake Regarding Identity

As with the "Same Conduct" prong of the relation-back inquiry, Appellant's Memorandum in the trial court contains only a heading with no text, argument, or evidence to support it, as follows:

> *d. Trident Construction Knew or Should Have Known That, but for a Mistake Concerning the Identity of the Proper Party, This Action Would Have Been Brought Against It.*

R. p. xx (Pineda Trial Court Memorandum at 7). No evidence, authority, or argument was presented to the trial court to support this bald assertion. Nor could there have been, as there can

[3] If Appellant sought or was granted leave from this Court to amend his initial brief, Trident received no notice of either fact.

be no contention that Plaintiff did not know exactly who Trident was at the time the complaint was filed. *See infra* Part V.C.1.

The issue is not preserved.

B. Equitable Tolling

Appellant's Memorandum to the trial court contains the following heading, again without any text, argument, or evidence offered to support it:

> II. If Necessary, the Court Should Grant Plaintiff's Motion Based on Equitable Considerations.

R. p. x (Pineda Trial Court Memorandum at 7). Appellant does not elucidate what those equitable considerations are, or how they would permit him to carry the heavy burden of demonstrating the propriety of equitable tolling. The argument was therefore not properly raised to the trial court and is not preserved for appeal.

C. Trident's Status as a Statutory Employer

Appellant's Memorandum to the trial court quotes (without citation or quotation marks) five paragraphs of a Fourth Circuit case called *Ziegler v. Eastman Chemical Company, LLC* [4] in support of the proposition that:

> Josue Pineda Orellana is not a Statutory Employee Pursuant to Keene v. CNA Holdings, LLC, Opinion Np. 28052 (Ex. F), Which is not Applied Retroactively Pursuant to Ziegler v. Eastman Chemical Company, LLC (2022) (*See* Ex. G).

R. p. xx–xx (Pineda Trial Court Memorandum at 7–9). This is puzzling on several levels, not least of which is that the *Ziegler* case *did* retroactively apply *Keene*,[5] despite Appellant's assertion that *Keene* is "not applied retroactively pursuant to Ziegler . . . ." *See* 54 F.4th at 199.

[4] 54 F.4th 187, 198–99 (4th Cir. 2022).

[5] *Keene v. CNA Holdings, LLC*, 436 S.C. 1, 870 S.E.2d 156 (2021).

But more significantly, the discussion of retroactive applicability is the sole argument Appellant raised to the trial court regarding *Keene*. At no point did Appellant argue to the trial court *how* the *Keene* case would strip Trident of its status as a statutory employer of Mr. Pineda. Accordingly, the issue is not preserved for appeal.

V. The Trial Court Correctly Held That the Proposed Amendment Would Be Futile.

Even if Appellant had not abandoned his argument that the trial court erred in denying reconsideration, the argument should be rejected by this Court, as the trial court did *not* err.

A. Trident Can Only Be Sued in Worker's Compensation.

It is well-settled law in South Carolina that, where a party is deemed to be a statutory employer of an injured party for purposes of the Workers' Compensation statute:[6]

(i) the statutory employer is required to provide Workers' Compensation Insurance to the injured party; and

(ii) the injured party's sole means of recovery from the statutory employer is in Workers' Compensation.

See Strickland v. Galloway, 348 S.C. 644, 646, 560 S.E.2d 448, 449 (Ct. App. 2002) ("In circumstances in which the South Carolina Workers' Compensation Act covers an employee's work-related accident, the Act provides the exclusive remedy against the employer."); *see also* S.C. Code Ann. § 42-1-540 (1985) ("The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, *shall exclude all other rights and remedies of such employee*, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death." (emphasis added)).

[6] S.C. Code § 42-1-10 *et seq.*

The question then is whether Trident is a statutory employer of Appellant. The Workers' Compensation statute provides as to contractors that:

> When any person, in this section and Sections 42-1-420 to 42-1-450 referred to as "contractor," contracts to perform or execute any work for another person which is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any of the work undertaken by such contractor, the contractor shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if that workman had been immediately employed by him.

S.C. Code § 42-1-410. In other words, whenever a contractor is hired by a party to perform work that is outside of the hiring party's business, trade, or profession, the contractor owes Workers' Compensation benefits to the employees of any subcontractors the general contractor hires for the project. This is the case here. Appellant was an employee of a subcontractor hired by Trident for a project on which Trident was the general contractor building a facility for a commercial truck dealer. Trident is a statutory employer, as Appellant acknowledged through counsel several months *after* filing this action. **R. p. xx** (Oct. 21, 2021 Email from Parker to Rannik at 1), and cannot be sued outside of Workers' Compensation.

1. The Keene Case Does Not Alter Trident's Status as Mr. Pineda's Statutory Employer.

Appellant now contends, though, that Trident's status is altered by the South Carolina Supreme Court's decision in *Keene v. CNA Holdings*, 436 S.C. 1, 870 S.E.2d 156 (2021). While this argument is not preserved (*see supra* Part IV.C), it is also error. *Keene* merely altered the analysis of whether an *owner* of property is a statutory employer under S.C. Code § 42-1-400; it

does not apply or alter the analysis as to *contractors* pursuant to S.C. Code § 42-1-410.[7] And to the extent it *does* alter the analysis as to contractors, it makes it *more* likely that a contractor will be found to be a statutory employer, not less.

This is because *Keene* focuses on whether the activity of the injured party falls within the "trade, business, or occupation" of the party claimed to be a statutory employer. *Keene*, 436 S.C. at 13–14, 870 S.E.2d at 163 ("The question posed by section 42-1-400 today is the same key question we addressed in *Marchbanks*: whether the work contracted out is 'part of the owner's trade, business or occupation.'"). The court held that the determination is one of business judgment and not law, and that a company's legitimate business decision to outsource certain work that it never self-performed was evidence that the work was not part of the company's "trade, business, or occupation." *Id.* at 14–15, 870 S.E.2d at 163. In so holding, the *Keene court* may have narrowed the previously expansive definition of what constitutes the "trade, business, or occupation" of the property owner.

And, when the putative statutory employer is the property owner, the injured party is a statutory employee only if he is performing an activity on the owner's behalf that is *within* the owner's "trade, business, or occupation":

> When any person, in this section and Sections 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which ***is*** **a part of his trade, business or occupation** and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.

[7] *See Keene*, 436 S.C. at 5, 870 S.E.2d at 158 (referring to Section 42-1-400 as "the section applicable in this case.").

S.C. Code § 42-1-400 (emphasis added). Accordingly, for owners, the *Keene* case may narrow the former breadth of the application of the Workers' Compensation exclusivity defense.

When the putative statutory employer is a contractor, however, the injured party is a statutory employee only if that activity is *not* within the owner's "trade, business, or occupation":

> When any person . . . referred to as "contractor," contracts to perform or execute any work for another person which ***is not*** **a part of the trade, business or occupation of such other person** . . ., the contractor shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if that workman had been immediately employed by him.

S.C. Code § 42-1-410 (emphasis added). The logic behind this is sound. The goal of these provisions is to ensure that workers are protected by Workers' Compensation insurance. *See Keene*. So, if the worker's activities *are* within an owner's trade, business, or occupation, the owner provides the coverage; if they are *not*, the contractor provides the coverage. Therefore, if *Keene* made it less likely that a worker's activity fits within the owner's "trade, business, or occupation," they made it more likely that the contractor is required to provide Workers' Compensation to that worker.

Here, the owner (Worldwide Equipment) is a commercial truck dealer operating in multiple states. *See, e.g.*, *Worldwide Equipment – New & Used Heavy Trucks, Parts, Service* (available at https://www.thetruckpeople.com/) (last visited July 29, 2024). Worldwide Equipment's "trade, business, or occupation" plainly does not include construction, or the painting of a new construction. As such, Trident—the contractor hired to build a new facility for Worldwide Equipment—was required to (and did) provide Workers' Compensation insurance for Appellant. This in turn means that Trident cannot be sued for Appellant's injuries in this action.

In sum, *Keene* does not change the well-established principle that a statutory employer may only be sued in Workers' Compensation. Accordingly, the only avenue for recovery against

Trident relating to this incident is in Workers' Compensation. Trident, therefore, cannot be a proper defendant in an action before this Court relating to this incident, rendering the proposed amendment futile. Appellant's Motion to Amend was properly denied.

B. Trident Was Already Sued in and Dismissed From a Worker's Compensation Proceeding.

Appellant brought a Workers' Compensation claim against Frank's and Trident. After the claim was settled, Trident was dismissed with prejudice. The dismissal of a claim with prejudice operates as *res judicata* and precludes further claims by the plaintiff against the same defendant. *See Nunnery v. Brantley Const. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) ("A dismissal 'with prejudice' indicates an adjudication on the merits and, operating as *res judicata,* precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication."); *see also Owenby v. Owens Corning Fiberglas* (sic), 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993) (finding a decision by the Workers' Compensation Commission precluded further litigation between the same parties with regard to the incident in question);

Trident has already been sued and the claims against it dismissed with prejudice. The matter is *res judicata*, and Trident cannot be sued again relating to the same incident. The trial court did not err.

C. Any Further Claim by Appellant Against Trident Is Barred by the Statute of Limitations.

The claim against Trident, to the extent this Court were to find it proper despite Trident's status as a statutory employer of Appellant, is untimely and is barred by the statute of limitations. The incident in question occurred on August 6, 2018, and the case was filed August 5, 2021, the day before the statute of limitations expired. **R. p. xx** (Compl. ¶ 42). The addition of new parties to this action was thus barred after August 6, 2021, unless the amendment adding the new party relates back to the date of the original filing. Here, it does not.

Under Rule 15(c), S.C.R.C.P., a claim against a new party[8] relates back to the date of the original complaint if:

(i) the claim against the new party arises out of the conduct set forth in the original pleading,

(ii) the new party received notice of the action such that it will not be prejudiced in defending the claim on the merits,

(iii) the new party knew or should have known that, *but for a mistake concerning the new party's identity*, the new party would have been added when the original complaint was filed, *and*

(iv) requirements ii and iii were fulfilled before expiration of the statute of limitations.

Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 214, 442 S.E.2d 584, 586 (1994). Here, were the issue properly preserved for appeal (*see supra* Part IV.A(1–3)), the second, third, and fourth elements are not satisfied, meaning Appellant's putative claim against Trident does not relate back to the date of the original complaint.

1. No Mistake

The third element fails because naming a John Doe defendant in the original pleading instead of the subsequently-named party does not constitute a "mistake" as to the latter's identity:

> Here, Appellants did not mistakenly name John Does for the Moving Defendants as contemplated by Rule 15(c)(3). They simply did not know who the correct defendants were at the time they filed their original complaint. Naming unknown, fictitious, or John Doe defendants in a complaint does not toll the statute of limitations until such time as the names of these parties can be secured. . . . It is well-settled in this circuit that plaintiffs should not be permitted to amend their complaint to remove the John Doe defendants and substitute

[8] This includes parties substituted for a John Doe defendant. *See Jackson v. Doe*, 342 S.C. 554, 558–59, 537 S.E.2d 567, 570 (2000) ("Had Jackson substituted Milligan for John Doe or simply corrected the name of the defendant, then the amendment should have been analyzed in light of the requirements of Rule 15(c) as set forth in Hughes for a determination of whether the amended complaint properly related back to Jackson's original action.").

> real parties, because their lack of knowledge of the proper defendants is not considered a "mistake" under Rule 15(c)(3).

Land v. Green Tree Servicing, LLC, 140 F. Supp. 3d 539, 546 (D.S.C. 2015). Here, Appellant was aware of Trident's identity all along. Not only did Appellant know Trident was the general contractor at the time this action was filed, but he had previously sued Trident in Workers' Compensation *and* served a subpoena upon Trident in this matter. In a June 26, 2020 email (over a year before suit was filed), counsel for Appellant discussed the suit that would be filed and noted it would not include Trident because Trident is a statutory employer:

> Regarding the release and confidentiality agreement, I don't know anything about potential indemnity agreements between potential subcontractor defendants and Trident (who I still maintain will not be named as a defendant due to statutory employer status) . . . .

R. p. xx (June 26, 2020 email from Parker to Rannik at 1).

There can be no contention that Trident was omitted as the result of a mistake concerning Trident's identity at the time this action was filed.

2. No Notice Prior to the Expiration of the Statute of Limitations

Even if this Court found that naming a John Doe defendant in place of the subsequently-named party *could* constitute a "mistake" for purposes of Rule 15(c)(3), the fourth element would remain unsatisfied, because Trident did not know nor should it have known *before the statute of limitations expired* that Appellant intended to name Trident as a Defendant. *See Hughes*, *supra*. Even plaintiff did not know at that time that it intended to attempt to sue Trident. Again, at the time the statute ran in August 2021, Trident had already been dismissed with prejudice from the Workers' Compensation action, Appellant's counsel acknowledged Trident was a statutory employer, and the *Keene* case relied-upon by Appellant had not yet been decided. [9]

[9] *Keene* was decided on August 11, 2021, five days after the statute of limitations expired.

However, Appellant argues that, because the undersigned represented a subcontractor who *was* named when suit was filed, the undersigned's knowledge on behalf of that client is imputable to Trident. This cannot be so. No copy of the complaint was served upon or sent to Trident or its counsel when it was filed. But even if the knowledge were imputable to Trident, it would not be sufficient to put Trident on notice that it would have been sued but for a mistake as to its identity. Indeed, more than two months after the statute of limitations expired, Appellant's counsel continued to acknowledge that Trident *could not* be sued because it was a statutory employer. **R. p. xx** (October 21, 2023 email from Parker to Rannik at 1) ("While Trident Construction is not a named party, they are a statutory employer, and will almost certainly be subpoenaed and deposed as this litigation progresses.").

3. Prejudice to Trident

Trident was not a party in the two years this case has been pending, has conducted no discovery of its own, been present at none of the depositions, and seen none of the other parties' discovery requests and responses. If Appellant believed Trident was a proper party, there was nothing stopping him from naming Trident at the time he filed suit. Adding Trident to the action after all discovery is completed would severely prejudice Trident.

Appellant suggests without explanation that this prejudice would be cured by a dismissal pursuant to Rule 40(j), S.C.R.C.P. However, no discovery could take place during the time the case was dismissed pursuant to that rule; further, all parties would have to agree to the Rule 40(j) dismissal — Appellant has not and cannot show that such agreement would be forthcoming.

In sum, even if any claim against Trident in this action were not barred by the Workers' Compensation exclusivity defense, Appellant's attempt to join Trident at this time is barred by the

statute of limitations. Accordingly, Appellant's proposed amendment would have been futile, and his Motion to Amend was properly denied.

D. Equitable Tolling Does Not Apply to Save Appellant's Untimely Claims.

Appellant contends that the statute of limitations as to Trident should be equitably tolled. In addition to being unpreserved (*see supra* Part IV.B), this argument is without merit.

The doctrine of equitable tolling is rarely applied in South Carolina. *Pelzer v. State*, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008). It applies primarily when a defendant's wrongdoing induced the plaintiff from refraining to sue the defendant before the statute expired and fairness requires tolling of the statute:

> The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.

Pelzer v. State, 378 S.C. 516, 521, 662 S.E.2d 618, 620 (Ct. App. 2008) (quoting 51 AM. JUR. 2D, *Limitation of Actions* § 174 (2007)). There is no suggestion of any such conduct here, let alone evidence of it.

Moreover, even if the *Keene* case changed the legal analysis regarding a contractor as statutory employer[10] (which it does not, as discussed *supra*), this case would not militate in favor of equitable tolling. The case did not come out in the days or months leading up to Appellant's

[10] Which it does not. As discussed *supra*, any narrowing of what constitutes an owner's "trade, business, or occupation" makes it *more* likely—not less—that a contractor will be required to provide Workers' Compensation insurance and therefore be entitled to the Workers' Compensation exclusivity defense.

motion to amend; it came out five days *after* the original complaint was filed, over twenty-one months before he sought to amend his pleading to name Trident.

Mr. Pineda's contention regarding equitable tolling was properly rejected by the trial court.

CONCLUSION

For the foregoing reasons, Trident asks this Court to dismiss this appeal as untimely, dismiss it as interlocutory, or affirm the trial court in full.

Respectfully submitted:

EPTING & RANNIK, LLC

This 29th day of July, 2024
Charleston, South Carolina

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