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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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Initial Brief of Appellant

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Statement of Issues on Appeal

I. Did the circuit court err as a matter of law in compelling joinder of multiple actions pursuant to Rule 20, SCRCP, upon the motion of Defendants Kent Oliver and Thompson Construction Group, Inc?

II. Is the order from the circuit court granting a defendant's motion for the joinder of separate actions pursuant to Rule 20, SCRCP, immediately appealable?

Statement of the Case

Following a November 12, 2020, multivehicle collision on I-26 in Newberry County, three separate lawsuits and a property damage arbitration were filed. Below is a summary of the multiple actions and an initial introduction to the parties involved.

	Plaintiff(s)	**Defendants**	**Venue**
Arender Action Filed May 17, 2023	Dean Arender Tamala Arender	Kent Oliver Thompson Construction Group, Inc. Curtis Ouellette Quality Haulers, Inc. DMX Transportation Services, Inc.	Newberry
Cozby Action Filed June 22, 2022	Jerry Cozby	Kent Oliver Thompson Construction Group, Inc. Curtis Ouellette Quality Haulers, Inc.	Sumter
Oliver Action Filed June 2, 2023	Kent Oliver	Curtis Ouellette Quality Haulers, Inc. Dean Arender U.S. Xpress Leasing, Inc. U.S. Xpress, Inc.	Newberry
Property Arbitration Filed March 7, 2023	U.S. Xpress, Inc.[1]	Kent Oliver Thompson Construction Group, Inc.	Newberry

(Amend. Compl. Arender, Cozby Compl., Oliver Compl., Arbitration Claim for Prop. Damage).

After the initiation of the above actions, Kent Oliver and his employer Thompson Construction Group, Inc. (hereinafter, collectively, "the Thompson Defendants") moved to join and consolidate the Arender Action, the Cozby Action, and the Oliver Action around the Cozby

[1] While not relevant to this appeal, this property damage arbitration is technically brought by Great West Casualty Company as subrogee of U.S. Xpress, Inc.

Action, in Sumter County.[2] This interlocutory appeal arises from the circuit court granting that motion.

The Defendants filed their motion to join and consolidate on August 18, 2023. (Motion to Join). Dean and Tamala Arender, in their capacities as Plaintiffs in the Arender Action, filed a written memorandum opposing the joinder and consolidation on October 6, 2023. (Arender Memo in Opp.). U.S. Xpress, Inc., US Xpress Leasing, Inc., and Dean Arender, in their capacities as Defendants in the Oliver Action, likewise filed a memorandum opposing the joinder and consolidation of the actions in Sumter. (U.S. Xpress Memo in Opp.). The circuit court in Sumter heard arguments from the parties to the various actions on October 9, 2023. (Order Joining p. 2). At the October 9, 2023, hearing, Cozby joined in U.S. Xpress, Inc., U.S. Xpress Leasing, Inc., and the Arenders' arguments opposing the Thomson Defendants' motion for joinder and consolidation. (Hearing Transcript pp. 33-34). On February 13, 2024, the circuit court issued an order joining the actions around the Cozby Action in Sumter County pursuant to Rule 20, SCRCP.[3] (Order Joining p. 13).

On February 23, 2024, the Arenders filed a motion to reconsider pursuant to Rule 59(e), SCRCP, with the circuit court in Sumter. (Arender 59(e)). The court denied that motion on April 4, 2024. (59(e) Denial Order). On May 3, 2024, the Arenders filed a notice of appeal, appealing the order joining the actions in Sumter. U.S. Xpress, Inc., US Xpress Leasing, Inc., and Dean Arender, in their capacities as Defendants in the Oliver Action, likewise noticed their appeal on the same day. The Court thereafter consolidated the multiple appeals.

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[2] The property damage arbitration was not joined, as it was still in arbitration. The Thompson Defendants noted in their motion that they anticipated an appeal from that arbitration and would thereafter move to join that action upon its appeal to the circuit court. (Motion to Join pp. 2-3).

[3] The order was filed and served upon the parties to the original Cozby Action in Sumter on February 13, 2024. It was filed and served in the Arender Action on February 21, 2024. (Order Joining p. 1).

On May 28, 2024, the Thompson Defendants moved to dismiss the appeal, arguing the order joining the actions in Sumter County was not immediately appealable. The Arenders, U.S. Xpress, Inc., and U.S. Xpress Leasing, Inc. opposed the dismissal and filed returns in opposition to that motion. On August 26, 2024, the Court denied the Thompson Defendant's Motion to Dismiss, but requested the parties address appealability in their briefs.

Statement of Facts

This appeal arises from the circuit court granting the Thompson Defendants' motion to compel joinder and consolidation of three actions pursuant to Rule 20, SCRCP. 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 Defendants who moved to have these actions joined and consolidated in Sumter, likewise filed his suit in Newberry County against 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 Thompson Defendants, Ouellett, and Quality Haulers, Inc. in Sumter County ("the Cozby Action").

The facts of the collision giving rise to these actions are of little consequence to this appeal in its current posture. However, the residences of the parties and the employment relationships between the parties are relevant. The chart below details the parties to each action and their respective residences:

Plaintiff(s)	Residence	Defendants	Residence
Arender Action: Filed- Newberry			
Dean Arender	Spartanburg	Kent Oliver	Spartanburg
Tamala Arender	Spartanburg	Thompson Construction Group, Inc.	Sumter
		Curtis Ouellette	Greenville
		Quality Haulers, Inc.	Greenville
		DMX Transportation Services, Inc.	Greenville
Cozby Action: Filed- Sumter			
Jerry Cozby	Spartanburg	Kent Oliver	Spartanburg
		Thompson Construction Group, Inc.	Sumter
		Curtis Ouellette	Greenville
		Quality Haulers, Inc.	Greenville

Oliver Action:			
Filed- Newberry			
Kent Oliver	Spartanburg	Curtis Ouellette	Greenville
		Quality Haulers, Inc.	Greenville
		Dean Arender	Spartanburg
		U.S. Xpress Leasing, Inc.	Foreign
		U.S. Xpress, Inc.	Foreign
Property Arbitration:			
Filed- Newberry			
U.S. Xpress, Inc.[4]	Foreign	Kent Oliver	Spartanburg
		Thompson Construction Group, Inc.	Sumter

(Amend. Compl. Arender, Compl. Cozby, Compl. Oliver).

At the time of the subject collision, several parties were working within the course and scope of their employment,[5] which prompted the inclusion of their employers as party defendants. (Compl. Cozby, Answer Cozby, Compl. Oliver, Answer Oliver). Specifically, Defendant Thompson Construction Group, Inc. employed Kent Oliver; Quality Haulers, Inc. and DMX Transportation Services, Inc. employed Curtis Ouellette; and U.S. Xpress, Inc. employed Dean Arender. As employers are generally immune from tort liability to their employees, the employee plaintiffs did not and could not name their employers as party defendants in the suits they brought. Therefore, the Arenders and Jerry Cozby could have brought their actions in Newberry, Spartanburg, or Greenville Counties. Kent Oliver could have brought his action in Newberry, Spartanburg, or Greenville Counties. However, Kent Oliver could not have brought his action in Sumter County.

[4] While not relevant to this appeal, this property damage arbitration is technically brought by Great West Casualty Company as subrogee of U.S. Xpress, Inc.

[5] Or, some agency relationship which at common law or pursuant to federal regulations makes the corporate entity vicariously liable for the torts of the employee or agent.

Standard of Review

The matters raised in this appeal involve questions of statutory and rule interpretation. The issue of interpretation of a statue is a question of law for the court. *Charleston County Parks Rec. Comm'n v. Sommers*, 319 S.C. 65, 459 S.E.2d 841 (1995) (holding the determination of legislative intent is a matter of law). The appellate courts are free to decide questions of law with no particular deference to the lower court. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000).

There is sparse case law in South Carolina addressing the standard of review for a ruling involving the joinder rules. *See Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 585, 819 S.E.2d 142, 145 (Ct. App. 2018) (recognizing limited Rule 21 case law). This appears to be partly because the joinder of parties has not historically triggered much appellate review. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 241–43, 701 S.E.2d 5, 25–26 (2010) (ruling for the first time that South Carolina trial judges may use Rule 21 SCRCP, like the federal courts do, to realign parties). A ruling regarding joinder is subject to the trial court's discretion. *See Demian v. S.C. Health & Human Servs. Fin. Com.*, 297 S.C. 1, 5–7, 374 S.E.2d 510, 512–13 (Ct. App. 1988) (applying abuse of discretion standard to Rules 20 and 21); *Ex parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007) (applying abuse of discretion standard to Rules 19 and 24). The federal courts typically apply an abuse of discretion standard in situations involving joinder. *See, e.g., DiretTV, Inc. v. Leto,* 467 F.3d 842, 844 n.1 (3d Cir. 2006).

However, this appeal does not involve any disputed facts or inferences to be drawn in favor of one party or another. Thus, whether reviewed de novo, in favor of the Appellants, or in favor of the Respondents, the Court's conclusions will be unaffected. This appeal raises only errors of law for the Court to review with no deference to the circuit court.

Argument

I. The Thompson Defendants Cannot Compel the Joinder of Multiple Actions Under Rule 20, SCRCP.

a. The Circuit Court Erred in Joining the Actions Pursuant to Rule 20, SCRCP.

The circuit court erred in compelling joinder upon a motion of Defendants pursuant to Rule 20, SCRCP. South Carolina Rules of Civil Procedure Rule 20 states:

> 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.

Rule 20, SCRCP (emphasis added). A plaintiff is not required under Rule 20, SCRCP, to join all parties in one action; rather, plaintiffs have the choice to join in one or litigate separately. *See Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 212, 758 S.E.2d 187, 192-93 (Ct. App. 2014).

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, the joinder of whole actions or, for a defendant to move for joinder. James F. Flanagan, *South Carolina Civil Procedure* 168 (3d ed. 2010) ("Rule 20 is permissive and does not require the joinder of all parties who might conceivable be interested in the matter. Joinder is compelled only if the strict requirements of Rule 19 are met.").

Pursuant to Rule 19, SCRCP, joinder is compelled only when:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

Rule 19(a), SCRCP. 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 of Rule 20, SCRCP, are met. *See Smith v. Tiffany*, 419 S.C. 548, 564, 799 S.E.2d 479, 487-88 (2017). "Ordinarily, the defendant cannot force another joint-tortfeasor into the litigation." Flanagan, *supra*, at 168. "In rare circumstances, others must be joined because Rule 19 requires the presence of a particular person for complete resolution of the matter." *Id.* at 168-69. 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. *Id.*

Respondents moved pursuant to Rule 20, SCRCP only. However, a motion predicated upon Rule 19, SCRCP, is likewise futile, as "[g]eneral considerations of efficiency or convenience of parties or witnesses do not require joinder under Rule 19." Flanagan, *supra*, 160. Joinder may be "compelled only if the strict requirements of Rule 19 are met." *Id.* at 168.

The circuit court acknowledged the Arenders' 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. (Order Joining pp. 5-7). That is correct as a general statement of law, but only as to joinder proposed by a plaintiff. Rule 20, SCRCP, 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.

There appears to be no reported South Carolina opinions addressing a defendant's motion for joinder pursuant to Rule 20, SCRCP. However, defendants have attempted to compel joinder in some federal cases pursuant to the analogous Federal Rule of Civil Procedure 20; the federal courts summarily dismiss those motions. *E.g., Hefley v. Textron, Inc.*, 713 F.2d 1487, 1499 (10th Cir. 1983) ("[A] defendant can not [sic] use rule 20 to join a person as an additional defendant . . . joinder of defendants under rule 20 is a right belonging to plaintiffs, and only when a right to relief is asserted against each defendant."); *Moore v. Cooper*, 127 F.R.D. 422 (D.D.C. 1989) ("Defendant cannot rely upon Rule 20(a) to obtain a court order to compel the presence of [a nonparty] as a plaintiff in this matter. Rule 20(a) is a rule by which plaintiffs decide who to join as parties and is not means for defendants to structure a lawsuit."); *General Investment Co. v. Ackerman*, 37 F.R.D 38 (S.D.N.Y. 1964) (denying defendants' motion to force plaintiff to join the presence of others as a plaintiff where the missing entities would have been proper parties within Rule 20, FRCP, but were not required parties under Rule 19, FRCP); *United States v. Bigley*, 2014 WL 6801764 at *8 (D. Ariz Dec. 3, 2014) (because the entities the defendant sought to join were "not necessary parties" the defendants "may not rely on Rule 20 as a means to add defendants to this matter."); *Moss v. Spartanburg Cnty. Sch. Dist. No. 7*, 2010 WL 2136642 at *2 (D.S.C. May

25, 2010); 4 James Wm. Moore et al., Moore's Federal Practice, § 20.02[1][b], [2][a][i] (3d ed. 2012) (Rule 20 "may be used by a defendant only if the defendant has asserted a counterclaim or crossclaim in the action . . . . The defendant has no right to insist that the plaintiff join all persons who could be joined under the permissive party joinder rule. . . . The permissive joinder rule gives the plaintiff a powerful tool to structure litigation. . . . It permits the plaintiff to join multiple parties on either . . . side.").

The circuit court erred in joining the actions pursuant to Rule 20, SCRCP. Rule 20, SCRCP, may not be utilized by defendants to join multiple actions. The order of the court must, therefore, be reversed.

b. The Circuit Court Erred in Relying upon Consolidation Factors to Compel Joinder.

The circuit court erred in relying upon consolidation factors to compel joinder pursuant to Rule 20, SCRCP. The Thompson Defendants initially moved for consolidation and joinder of the multiple actions. (Motion to Join pp. 1-3). At oral arguments, counsel for the Thompson Defendants acknowledged that joinder and consolidation are mutually exclusive and proceeded only upon a motion for joinder pursuant to Rule 20(a), SCRCP. (Hearing Transcript p. 34). However, in support of the motion for joinder, the Thompson Defendants relied upon factors relevant to consolidation and not relevant to joinder under Rule 19 or Rule 20. (*See e.g.,* Hearing Transcript 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. (Order Joining p. 5). The circuit court, nonetheless, assessed the motion under standards applicable to motions to consolidate and conflated, at the direction of the Thompson Defendants, the requirements for joinder and the requirements for consolidation and under Rule 42(a), SCRCP. (Order Joining p. 10 ("Joinder is desirable for the parties and the court."); p. 11 ("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 the cost to the parties, conserve judicial resources…."); p. 12 ("[T]he court finds the benefits of joinder outweigh any concerns associated with a single trial.")).

As general considerations of efficiency or convenience of parties or witnesses are not relevant to joinder under Rules 19 or 20, the circuit court erred in joining of these actions.

c. The Circuit Court Order Fails to Comply with Rule 20(a), SCRCP.

Further complicating matters, even if compulsory joinder was appropriate under Rule 20, 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).

Here, the circuit court did not simply join parties as plaintiffs and join parties as defendants, as evidenced by the case caption on the circuit court's order denying the Rule 59(e) motions. (59(e) Denial Order). The caption shows three separate actions as if they were consolidated; the only difference now is that there is only one case number. (59(e) Denial Order). 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 into litigation with 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 making their employers party defendants when the employers cannot be joint tortfeasors. *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).

d. The Circuit Court's Order Impermissibly Transfers Venue.

The circuit court's order impermissibly transfer venue from Newberry to Sumter County. The motion of the Thompson Defendants is a thinly veiled attempt at forcing a venue transfer to a venue that is not appropriate for their own employee's action. As explained, *supra*, Rule 20, SCRCP, is an inappropriate vessel for a defendant to effect joinder; it is also an impermissible method to change venue. Pursuant to Rule 82, SCRCP:

> (a) [t]hese rules shall not be construed to extend or limit the jurisdiction of any court of this state or, except as provided in Rule 82(b), the venue of any action.
>
> (b) When an action is brought in the wrong county or in the wrong court, the court shall not dismiss the action but shall transfer it any proper county or court in which it could have been brought.

Rule 82, SCRCP. The circuit court expressly declined to analyze a change of venue pursuant to section 15-7-100 and found specifically that the Thompson Defendants did "not seek a change in venue based on the convenience or witnesses and the ends of justice." (Order Joining p. 9). The

circuit court, therefore, impermissibly construed Rule 20, SCRCP, to change the venue of the Arender Action and Oliver Action.

The circuit court acknowledged this directly, by stating "[t]he 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 [sic] from Newberry County to Sumter County, the Court's Order is not based on section 15-7-100." (Order Joining p. 9). Most pointedly, the circuit court asserted, "the fact that the Oliver Action could not have been brought in Sumter County does not change this analysis." (Order Joining p. 9).

Even if the circuit court may join parties pursuant to a defendant's Rule 20, SCRCP, motion and may utilize the Rules to effect a change in venue, it erred in holding "Thompson's right to defend the Cozby case in Sumter County further supports the Court's decision to join these cases in Sumter County" and erred in holding "Thompson has a substantial right to be tried in its county of residence." (Order Joining p. 10). At the Thompson Defendants' direction,[6] the circuit court disregarded the 2005 amendments to the relevant venue statute, S.C. Code Ann. section 15-7-30.

In support of its decision, the circuit court mistakenly claims *Jeter v. S.C. Department of Transportation* supports its order because *Jeter* referred to a defendant's substantial right to be tried in its county of residence and was decided in 2006, after the passage of the 2005 amendments. (Order Joining p. 10). *Jeter* plainly states its analysis was controlled by the pre-amendment text

[6] Counsel for the Thompson Defendants:

> I mean, you think about this judge, you were practicing law back then. I was practicing law back then. I'm not sure they were. But - - but one thing that I know is at that point, the case law . . . . And 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 we're not disputing that we can be sued in - - Newberry County. . . . *It's just that we want to be here in Sumter County, and we have substantial right.*

(Hearing Transcript pp. 13-14 (emphasis added)).

and the amended statute was inapplicable. *Jeter v. S.C. Dept. of Trans.*, 369 S.C. 433, 441 at n.7, 633 S.E.2d 143, 147 at n.7 (2006) ("The 2005 amendments to 15-7-30 are not applicable to this case. *See* 15-7-30 (supp. 2005) (applicable to causes of action arising on or after July 1, 2005.)"). Moreover, the *Jeter* court held the circuit court erroneously changed venue to the defendant's home county because the claim was brought in a proper venue pursuant to S.C. Code Ann. section 15-78-100(b). *Id.* at 442-43, 633 S.E.2d at 148.

The circuit court, therefore, erred in compelling joinder pursuant to Rule 20, SCRCP, erred in analyzing a joinder motion based upon consolidation factors, improperly joined the parties in one action, and improperly transferred venue. The circuit court's order must be reversed.

II. The Circuit Court Order Granting the Thompson Defendants' Motion to Compel Joinder Pursuant to Rule 20, SCRCP is Immediately Appealable.

a. Appealability Standard.

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

> (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 orders 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 the merits of their claims 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 Cty*, 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" and is immediately appealable. *Mid-State Distrib., Inc. v. Century Imp., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Interlocutory orders are 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. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). The right to Appeal 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, 152, 564 S.E.2d 681, 688 (Ct. App. 2002).

In assessing the immediate appealability of this order, an assessment of the merits and the effect of the order are inherently necessary. As discussed, *supra*, this is not a case where an appeal is filed following the grant or denial of a routine motion. This is not even 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 a similar nature. Indeed, counsel has been unable to even find an order, appealed or unappealed, or a motion, granted or denied, of like kind that is premised upon Rule 20, SCRCP. Therefore, the merits of the appeal and the effect of the order necessarily influence the order's appealability. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539-40, 773 S.E.2d 144, 147 (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—not merely what it appears to be.").

b. An Order Granting a Defendant's Motion to Join Plaintiffs, Defendants, and Actions Pursuant to 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 because the order is premised upon improper procedure, there is no appellate opinion directly addressing the immediate appealability of an order granting a defendant's motion to join additional parties pursuant to Rule 20, SCRCP. While there are opinions addressing the immediate appealability of orders that effect the same or similar results, they are premised upon different or prior rules, which would, procedurally, make the defendant's 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 an entity and individual as named defendants because the original defendant believed the joined parties were actually responsible for the harms alleged in the complaint. *Simon v. Strock*, 209 S.C. 134, 138, 39 S.E.2d 209, 210 (1946). The plaintiff filed an immediate, interlocutory appeal. *Id.* at 137, 39 S.E.2d at 210. The supreme court heard the appeal and reversed the trial court, 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 further explained, "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 to join other parties had "the effect of overriding [a] repeatedly declared legal right and revoking well-recognized procedure," the court reversed the trial court's order on an intermediate appeal "in order to expedite the final determination of this litigation."[7] *Id.* at 138-39, 39 S.E.2d at 210-11.

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.* at 139, 39 S.E.2d at 211*; Smith* 419 S.C. at 563, 799 S.E.2d at 487 (citing *Simon* in 2017 in support of the proposition 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.").

While *Smith* does not address joinder pursuant to Rule 20, SCRCP, it is instructive as to the issues currently before the Court. *Smith*, 419 S.C. at 563, 799 S.E.2d 479. It also validates the *Simon* holding for the modern day and underscores the substantial rights involved in this matter.

[7] Coincidentally, the *Simon* court also noted that in addition to 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* section I.c.

Id. In *Smith*, a defendant sought to join a joint tortfeasor who settled prior to the initiation of the suit. *Id.,* 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. *Id.* 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,[8] and most importantly for the present motion, the court held the appeal could proceed immediately in its interlocutory status.[9] *Id.* at 553-55, 799 S.E.2d at 481-83.

Correspondingly, in *Neeltec Enters. Inc. v. Long*, the supreme court held an appeal of an order granting a defendant's motion to have himself substituted by two different defendants was immediately appealable. 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.* at 566, 725 S.E.2d at 928. Because the order affected the plaintiff's substantial right to choose her defendant, it was immediately appealable under section 14-3-330.

In *Morrow*, 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 pursuing the claim against a second defendant. 412 S.C. at 537, 773 S.E.2d 145. 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

[8] This holding is also relevant to the substance of the present appeal.

[9] 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." *Smith*, 419 S.C. at 552, n.1, 799 S.E.2d 479 at 481, n.1.

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 the argument that the appealability of the order should be controlled by what the order "appears to be," holding instead that the order should be evaluated in light of "what it is" and in light of its effect. *Id.* at 540, 733 S.E.2d at 147.

In addition to the substantial rights involved in *Morrow* the court also allowed the appeal to proceed interlocutory because the circuit court misapprehended the nature of the plaintiffs' claims. *Id*. 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, which as in *Morrow*, provides an additional reason for immediate review. 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.

Because no mandatory authority addresses the appealability of an order granting defendants' motion to join multiple actions and multiple parties in a new venue where the order is premised upon improper procedure, the foregoing cases are instructive. Those cases underscore the substantial rights at issue in this matter and the impact the order has upon those rights, when the effect of the order is considered, as contemplated in *Morrow*. *Id.* Although the circuit court's order frames itself as a simple discretionary grant of a motion to join additional parties and consolidate multiple actions in a new venue under Rule 20, SCRCP, its effect is much greater and broader. Consideration of the effect of the order must begin with an acknowledgment that Rule 20, SCRCP, does not permit a defendant to join additional defendants and plaintiffs without being a plaintiff by virtue of a crossclaim or counterclaim. The Thompson Defendants asserted no crossclaims or counterclaims in the Cozby action and, therefore, cannot attempt to join parties

unilaterally under Rule 20, SCRCP. 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*. It clearly involves substantial rights that are immediately appealable.

Those cases establish that the Arenders have a "repeatedly declared legal right" to join with Plaintiffs of their choosing and likewise have a substantial right in pursuing their causes of action against the Defendants of their choosing. *Simon*, 209 S.C. at 139, 39 S.E.2d at 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 564, 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). 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.

The circuit court violated the Arenders' well established and substantive right to choose their own defendant and to choose with whom to join as plaintiffs. Because these errors affect the mode of the trial and affects substantial rights of the Arenders, the order is immediately appealable.

Moreover, the order reflects the circuit court's misapprehension of the improperness of the procedure requested in the Thompson Defendants' motion, and that misapprehension necessitates immediate appeal. *Id.* at 538, 773 S.E.2d at 146.

Conclusion

For these reasons, the Arenders respectfully request the Court reverse the order of the circuit court granting the motion for joinder of the separate actions and find the actions may not be properly joined pursuant to the Thompson Defendants' motion premised upon Rule 20, SCRCP. Furthermore, they respectfully request the Court correct the errors of the circuit court at this interlocutory stage so the errors raised in the appeal may be promptly and efficiently corrected.

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