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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

The Honorable R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2024-000742

Jerry Cozby, Plaintiff,

vs.

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

of which Kent Hunley 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 Hunley Oliver and Thompson Construction Group, Inc. are Respondents.

AND

Kent Huntley Oliver, Respondent,

vs.

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

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

APPELLANTS DEAN ALAN ARENDER, U.S. XPRESS LEASING, INC., AND U.S. XPRESS, INC.'S REPLY BRIEF

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ARGUMENTS

I. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR PERMISSIVE JOINDER AND DENYING APPELLANTS' MOTIONS TO RECONSIDER WHEN IT FOUND THAT PERMISSIVE JOINDER WAS PROPER AND DONE PROPERLY.

a. Appellants Have Not Abandoned Arguments as to the Merits of the Appeal.

Appellants have not abandoned arguments regarding the merits of the Circuit Court's Orders as they addressed their arguments throughout the "appealability" section of its Initial Brief. Respondents argue that "[b]ecause US Xpress presents only conclusory arguments with no supporting authority, it has abandoned any argument that the circuit court erred in joining the parties in the Cozby Action." (R. p. ___; Respondents' Initial Brief at p. 5). Respondents cite to *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) and *Wayne's Auto. Ctr. v. S.C. Dep't. of Pub. Safety*, 431 S.C. 465, 480 n. 6, 848 S.E.2d 56, 65 n. 6 (Ct. App. 2020), which hold that parties abandoned their arguments on appeal when providing conclusory statements without any supporting authority.

Here, Appellants' Initial Brief's "Argument" section was divided into two sections: appealability and merits. However, the arguments as to why the Orders are immediately appealable were the same exact arguments as to why the Court erred: "The reasons set forth in the appealability section constitute the same arguments Appellants rely on to show why the Court erred in finding that permissive joinder was proper in these actions." (R. p. ___; USX and Arender's Initial Brief at pp. 15-16). Appellants did not simply present "only conclusory arguments with no supporting authority" as there was supporting authority in the first fifteen pages of the brief. For the sake of conciseness, and to not waste the Court's time, Appellants cite to the "appealability"

section in the "merits" section of the brief. Therefore, Appellants have not abandoned their arguments and will address the merits of the appeal herein.[1]

b. Respondents Continue to Conflate Joinder and Consolidation.

By way of background, Thompson Construction Group, Inc. (hereinafter "Thompson") and Kent Huntley Oliver (hereinafter "Oliver") originally filed a Motion for Permissive Joinder *and* Consolidation. (R. pp. ____; Oliver and Thompson's Motion for Permissive Joinder and Consolidation). At the hearing, counsel for Oliver and Thompson asked only for joinder under Rue 20, SCRCP, dropping the "consolidation" part of their initial and written motion. (R. p. ___; Motion for Permissive Joinder and Consolidation Hearing Transcript). Judge Griffin then emailed a ruling to all counsel, granting the Motion for Permissive Joinder *and* Consolidation and asked counsel for Oliver and Thompson to prepare a proposed order. (R. pp. ___; Judge Griffin's Ruling on Motion for Permissive Joinder and Consolidation). The proposed order drafted by counsel for Oliver and Thompson was then signed by Judge Griffin. (R. pp. ____; Order granting Motion for Permissive Joinder). The Order states: "The Court agrees with Thompson that joinder for both discovery and trial is justified under the circumstances presented in these cases." (R. p. ____; Order granting Motion for Permissive Joinder at p. 11). Appellants then filed their Motion to Reconsider, addressing concerns over the Order appearing to favor consolidation rather than joinder. (R. p. ___; USX and Arender's Motion to Reconsider at p. 3).

Here, Respondents state that the "circuit court understood that 'an order of permissive joinder merges previously separate actions into one,' and unambiguously ruled that the actions were joined '*for both discovery and trial*.'" (R. p. ____; Respondents' Initial Brief at p. 15) (emphasis added). However, this language, used in the Order and Respondents' brief, is commonly

[1] Notably, Respondents recognized and addressed each argument Appellants made in its Initial Brief throughout the merit section.

used for consolidation rather than joinder—in which a court can consolidate matters for the purpose of discovery and / or trial pursuant to Rule 42(a), SCRCP.[2] *See Miller v. Point Arcadia Horizontal Prop. Regime, Inc.*, No. 2009-UP-344, 2009 WL 9529188, at *1, fn. 1 (S.C. Ct. App. June 22, 2009) ("The trial court consolidated the cases for discovery and trial"); *Keels v. Pierce*, 315 S.C. 339, 341, 433 S.E.2d 902, 903 (Ct. App. 1993) ("Pierce moved to consolidate the two actions for discovery and trial purposes"); *see also Carolina Cargo, Inc. of Rock Hill v. Countrywide Payroll & HR Sols., Inc.*, No. 0:15-CV-04629-JMC, 2017 WL 1314239, at *1 (D.S.C. Feb. 10, 2017) ("This matter is before the court pursuant to Plaintiff's Motion to Consolidate ... for discovery and trial"); *Ford Motor Credit Co., LLC v. Rhodes*, No. CV 4:11-3303-MGL, 2013 WL 12242016, at *1 (D.S.C. Feb. 15, 2013) ("Defendant seeks to consolidate this action ... for discovery and trial purposes in the interest of judicial economy"). The use of language applicable to consolidation rather than joinder reflects the Order and Respondents' conflation between consolidation and joinder.

c. The Issue is Whether the Court Erred in How it Joined the Parties in the First Place.

The Circuit Court's Orders and Respondents' Initial Brief overlook two main issues—the Orders fail to provide a clear understanding of how the parties were joined and how the claims operate as one joined case under Rule 20(a), SCRCP.

Here, the Orders did not include any discussion of how the parties were joined and whether they are being joined as plaintiffs or defendants in the one joined action. (R. pp. ___; USX and Arender's Initial Brief at pp. 13-15).[3] Without knowing how the parties were joined, we do not

[2] Rule 42(a), SCRCP states: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the action; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

[3] This issue was also discussed in Appellants' Motion to Reconsider. (R. p. ___; USX and Arender's Motion to Reconsider at p. 3).

know how the claims proceed within this one action. The easiest way to see this issue is through the case caption. Respondents state that "the caption simply reflects the claims asserted by Cozby, the Arenders, and Oliver" and "identifies the relief demanded by each plaintiff." (R. p. ___; Respondents' Initial Brief at p. 15). However, this is only an assumption on behalf of Respondents. First, the Orders do not provide this clarifying information. Second, the Order Granting Permissive Joinder actually contradicts Respondents' statement:

> In any event, Oliver is not the only plaintiff with an interest in determining Arender and U.S. Xpress' negligence. **Arender and U.S. Xpress' negligence is also at issue in the Cozby Action**, where defendants have asserted that Cozby's injuries were caused by the fault of others, **and in the Arender Action**, where defendants have asserted comparative negligence defenses.

(R. p. ___; Order granting Motion for Permissive Joinder at p. 7) (emphasis added). Based on this section of the Order, there is relief demanded by Plaintiff Cozby against Defendants Arender and USX that is not indicated by the case caption and was never pled by Cozby. (*See generally* R. pp. ___; Cozby Complaint). Respondents go on to state that "[t]he case caption confirms that the circuit court's order has not resulted in any new claims." (R. p. ___; Respondents' Initial Brief at p. 15). However, again, this contradicts what the Circuit Court's Order actually states—the Order is creating new claims that did not exist prior to joinder. Therefore, the parties cannot rely on the case caption in order to determine how the claims are proceeding.

Moreover, as stated above, the Order provides that "Arender and U.S. Xpress' negligence is also at issue ... in the Arender Action, where defendants have asserted comparative negligence defenses." (R. p. ___; Order granting Motion for Permissive Joinder at p. 7). If USX's negligence is at issue in the Arender Action, then this clearly runs afoul to the Workers' Compensation Exclusivity Doctrine. *See Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 224, 661 S.E.2d 395, 403 (Ct. App. 2008) ("[t]he exclusivity provision of the [Workers' Compensation] Act precludes

an employee from maintaining a tort action against an employer where the employee sustains a work-related injury").

Therefore, as the Orders fail to provide a clear understanding of how the parties were joined and how the claims operate as one joined case, the Court erred in granting permissive joinder.

d. Arguments Regarding the Benefits of Joinder and Ordering Separate Trials are Irrelevant.

Respondents spend time discussing the benefits of joinder in Section I.B. and the availability of the court ordering separate trial pursuant to Rule 20(b), SCRCP in Section I.D. (R. pp. ___; Respondents' Initial Brief at pp. 9-11 and 15). However, these arguments are irrelevant in the analysis of whether the Court erred in how it joined the parties. First, Rule 20, SCRCP does not require an analysis of whether joinder is beneficial. And second, and more importantly, the issue in front of the Court is not whether the parties can later rely on Rule 20(b), SCRCP—the issue is whether the court erred in how it joined the parties in the first place.

II. THE ORDER GRANTING PERMISSIVE JOINDER AND ORDER DENYING THE MOTIONS TO RECONSIDER ARE IMMEDIATELY APPEALABLE UNDER S.C. CODE ANN. § 14-3-330.

a. The Circuit Court Orders are Immediately Appealable Because the Appellants' Right to Choose its Defendants is a Substantial Right.

All parties agree that "'the right of a plaintiff to choose her defendant is a substantial right' under 14-3-330(2)."[4] (R. p. ___; Respondents' Initial Brief at p. 18). Respondents proceed to run through the applicable case law that has been discussed in each respective parties' Motion to Dismiss, Return to Motion to Dismiss, and Initial Briefs: *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012), *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412

[4] Respondents state that "US Xpress is not a plaintiff and does not have standing to challenge any alleged violation of a plaintiff's 'substantial right to name its defendants.'" (R. p. ___; Respondents' Initial Brief at p. 17). However, Respondents fail to realize that the undersigned counsel represents not only the US Xpress parties but Dean Arender as well—one of the alleged plaintiffs in the joined action.

S.C. 534, 773 S.E.2d 144 (2015), and *Dorn v. Cohen*, 418 S.C. 126, 791 S.E.2d 313 (Ct. App. 2016), aff'd as modified, 421 S.C. 517, 809 S.E.2d 53 (2017).

Respondents believe that *Neeltec* and *Morrow* do not control here as "[t]hose cases involved orders that deprived plaintiffs of the ability to maintain their suits against particular defendants." (R. p. ___; Respondents' Initial Brief at p. 18). However, the court in *Neeltec* and *Morrow* do not limit their holding in the way Respondents do so in their brief. Moreover, these cases are meant to be instructive as there is no case law directly on point. Rather, these two cases clearly support—and Respondents agree—that the right of a plaintiff to choose its defendants is a substantial right. Moreover, Respondents urge the Court to follow the Court of Appeals' reasoning in *Dorn*, even though the Supreme Court "vacate[d] the court of appeals' analysis." *Dorn*, 421 S.C. at 520, 809 S.E.2d at 54.

Next, Respondents cite to an unpublished opinion to support its argument that an order of permissive joinder is not immediately appealable. *See Hoyler v. State*, Appellate Case No. 2011-190650; Sept. 26, 2011 Order. (R. p. ___; Respondents' Initial Brief at p. 21). As an initial matter, "unpublished opinions have no precedential value." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 338 S.C. 343, 349, 526 S.E.2d 253, 256 (Ct. App. 2000). Moreover, Hoyler is different than the case at hand. In *Hoyler*, a master ordered thirty-two adjacent property owners to be joined *as defendants* in an action. *See id.* On the other hand, here, the Orders did not address how the parties were being joined or deal with a situation where parties could easily be joined as defendants. Rather, the joinder at issue in this case involved joining three separate actions with various plaintiffs and defendants within each action that do not merge cohesively. Our appealability analysis, therefore, focuses not only on whether the grant of permissive joinder is immediately appealable but whether how the cases were joined is immediately appealable.

As Appellants have acknowledged, none of these cases address whether an order granting permissive joinder pursuant to Rule 20 of the *South Carolina Rules of Civil Procedures* is immediately appealable under S.C. Code Ann. § 14-3-330(2)(a). Therefore, it is necessary for the Court to address "the question of whether an order is immediately appealable is determined on a case-by-case basis." *Dorn*, 418 S.C. at 138, 791 S.E.2d at 319 (citing *Morrow*, 412 S.C. at 538, 773 S.E.2d at 146).

Therefore, for the reasons stated above and within Appellants' Return to the Motion to Dismiss as well as its Initial Brief, the Orders are immediately appealable because the Appellants' right to choose its defendants is a substantial right.

b. The Circuit Court Orders are Immediately Appealable Because the Appellants' Right to a Particular Mode of Trial is a Substantial Right.

Respondents argue that Appellants' mode of trial argument fails because the Order "did not create any new claims." (R. p. ___; Respondents' Initial Brief at p. 21). In support of this argument, they cite to the case caption as it allegedly "confirms there is no violation of the workers' compensation exclusivity doctrine." (R. p. ___; Respondents' Initial Brief at p. 22). However, as stated above, Respondents' reliance on the case caption is misplaced. First, the Order did not clarify how the claims were to proceed as joined. While Respondents rely upon the case caption in this appeal, the Order did not state that the case caption was to show how the claims were proceeding. Therefore, without any clarification in the Orders, one was left with an action where Arender is a Plaintiff and USX is a Defendant, running afoul to the Workers' Compensation Exclusivity Doctrine. Second, the Order did create new claims as it explicitly made "Arender and U.S. Xpress' negligence ... at issue in the Cozby Action" when Arender and USX were not named as defendants in that action prior to joinder. (R. p. ___; Order granting Motion for Permissive Joinder at p. 7). Lastly, the Order states that USX's negligence could be at issue in the Arender action: "Arender

and U.S. Xpress' negligence is also at issue ... in the Arender Action, where defendants have asserted comparative negligence defenses." (R. p. ___; Order granting Motion for Permissive Joinder at p. 7). Therefore, the Orders are immediately appealable because Appellants are entitled to a trial that does not invade the Workers' Compensation Exclusivity Doctrine.

c. The Circuit Court Orders are Immediately Appealable Because They Involve the Merits of the Action.

Appellants argue that the Orders affect the merits of the action and are, therefore, immediately appealable pursuant to S.C. Code Ann. § 14-3-330(1). Respondents first take issue with Appellants' reliance on *Wosepka v. Dukart*, 160 N.W.2d 217 (N.D. 1968), as "the Supreme Court of North Dakota acknowledged the 'general proposition that orders permitting or refusing the joinder of additional parties are not appealable.'" However, as explained above, the subject Orders are not ones that simply permit the joinder of additional parties—the Orders join three actions without any guidance as to how the parties were joined and how the claims were proceeding.

Next, Respondents go on to claim that "South Carolina cases have recognized that orders adding parties to litigation do not involve the merits under 14-3-330(1)," citing *Duncan v. Gov't Emps. Ins. Co.*, 331 S.C. 484, 449 S.E.2d 580 (1994) and *Edgefield County Hospitals Trustees v. Cannon Construction and Supply Co.*, 273 S.C. 500, 257 S.E.2d 501 (1979). (R. p. ___; Respondents' Initial Brief at p. 22). However, *Duncan* simply holds that "an order granting a motion to intervene is not immediately appealable, while *Edgefield* holds that "an order making a third party a defendant is not immediately appealable." *Duncan*, 331 S.C. at 486, 449 S.E.2d at 580. Neither of these rulings are applicable in this case. Moreover, these decisions provide no analysis at all as to why these orders did not involve the merits pursuant to 14-3-330(1).

Lastly, Respondents argue that "US Xpress fails to articulate how [the order failing to identify whether the parties were joined as plaintiffs and defendants] would 'finally determine some substantial matter forming the whole or a part of some cause of action or defense.'" (R. pp. ___; Respondents' Initial Brief at pp. 22-23). However, in Appellants' Initial Brief, it identified the following areas where the Orders finally determined substantial matters forming the whole or part of causes of actions and defenses: (1) verdict form issues, (2) additional claims against USX, (3) Workers' Compensation Exclusivity Doctrine, and (4) right to election. (R. pp. ___; USX and Arender's Initial Brief at pp. 13-14). The Orders, therefore, affect the merits of the action and determine a substantial matter forming the whole or part of causes of actions and defenses by putting USX on the same verdict form as Arender and Cozby and creating additional causes of action against USX, making the Orders immediately appealable pursuant to S.C. Code Ann. § 14-3-330(1).

CONCLUSION

For the reasons set forth above and in its Initial Brief, Appellants request that this Court reverse the Order granting Thomspon Construction and Kent Oliver's Motion for Permissive Joinder and the Order denying Arender and USX's Motion to Reconsider.

Signature Page Follows

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned of the law offices of Sweeny, Wingate & Barrow, PA, attorney for Appellants Dean Alan Arender, U.S. Xpress Leasing, Inc., and U.S. Xpress, Inc., do hereby certify that the Reply Brief has been served on all counsel to this appeal. The motion has been served by email sent to the addresses below:

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