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.

PETITION FOR REHEARING

Appellants Dean Alan Arender ("Arender"), U.S. Xpress Leasing, Inc., and U.S. Xpress, Inc. (together, "USX") respectfully petition this Court for rehearing pursuant to Rule 221, SCACR.

Summary of Grounds for Rehearing

On November 12, 2020, four drivers were involved in a multi-vehicle collision on Interstate 26 in Newberry County, South Carolina: (1) Jerry Cozby ("Cozby"); (2) Curis Ouellette ("Ouellette"), driving for Quality Haulers, Inc. ("Quality") and/or DMX Transportation Services, Inc. ("DMX"); (3) Kent Huntley Oliver ("Oliver"), driving for Thompson Construction Group, Inc. ("Thompson"); and (4) Arender, driving for USX. (R. p. 2). Four lawsuits followed, with this appeal concerning three of those suits: (1) Cozby's suit against Oliver, Thompson, Ouellette, and Quality, filed in Sumter County (the "Cozby Suit"); (2) Arender and his wife, Tamala Arender's (together, the "Arenders"), suit against Oliver, Thompson, Ouellette, Quality, and DMX, filed in Newberry County (the "Arender Suit"); and (3) Oliver's suit against Ouellette, Quality, Arender, and USX, filed in Newberry County (the "Oliver Suit").

Oliver and Thompson later moved for permissive joinder and consolidation of the Cozby, Arender, and Oliver Actions. (R. pp. 187–90). The Arenders and USX opposed Oliver and Thompson's motion. (R. pp. 199–220.) Though Oliver and Thompson subsequently dropped their request for consolidation, the circuit court granted Oliver and Thompson's motion for permissive joinder *and* consolidation. (R. pp. 5, 281; pp. 299–300). The circuit court's order purports to *join* the three lawsuits as one but instead appeared to simply *consolidate* the actions. (R. pp. 1–14). The order does not show the matters joined under one caption; instead, all three lawsuits are listed

under separate captions. (R. p. 1.) However, the caption only identifies the *Sumter County* case number. *Id.*

Given that the circuit court did not actually join the actions—it merely effectively consolidated the matters—Arender and USX are left to guess as what a joined caption would look like. With that said, presumably Cozby, the Arenders, and Oliver would be on one side of the "v" as plaintiffs and Ouellette, Quality, DMX, Oliver, Thompson, Arender, and USX on the other side of the "v" as defendants. Arender and Oliver would effectively have the status of plaintiff *and* defendant; Mrs. Arender would be a plaintiff in a suit against her husband and USX, against whom she had no claims; Oliver and Arender would serve as plaintiffs in suits against their employers; and Cozby would be a plaintiff in a suit against Arender and USX, against whom he had no claims.

Arender and USX separately appealed the circuit court's order, arguing that the order is immediately appealable both because it affects the merits of the case and because it affects several substantial rights. The Court of Appeals dismissed the appeal as premature on February 4, 2026.

Argument

I. The Court of Appeals misapprehends or overlooks that Arender and USX ***were not*** parties to the Cozby Action.

In finding the circuit court's order does not involve the merits Court of Appeals distinguishes this appeal from one where "a plaintiff [is] forced to sue a defendant against his wishes," noting "[i]n this case, the plaintiffs are not being forced to sue any defendants against their wishes; rather, Appellants are all already parties." [Order at 5.] But Arender and USX were not already parties to *all* the actions before the circuit court entered its order. Rather, Cozby *did not* name Arender or USX in his action. Cozby had the option to name Arender and USX in his suit and chose to not do so. Cozby never attempted to amend his complaint to bring claims against either defendant. And, as the circuit court noted in its order, **Cozby opposed Thompson and**

Oliver's motion. (R. p. 4). Now, however, the circuit court's order requires Arender and USX to be added as parties to the Cozby action by virtue of the joinder, against Cozby's wishes. Though the Court of Appeals notes that the case on which Arender and USX rely for its merits argument, *Wosepka v. Dukart*, 160 N.W.2d 217 (N.D. 1968), was later called into question by the North Dakota Supreme Court, the issue before that court is distinguishable from the case at bar. *See Belden v. Hambleton*, 554 N.W. 2d 458, 460 (N.D. 1996). In *Belden*, the court declined to decide whether *Wosepka* is not good law, noting that nothing in the record suggested that the underlying plaintiffs did *not* want a new defendant joined as a party to their action. *Id.* at 461. "*Because*" those plaintiffs were "not being forced to sue a defendant against their wishes," the court concluded the situation fell "under the general rule that an order joining parties is not an appealable order." *Id.* (emphasis added). As noted herein, Cozby opposed Thompson and Oliver's request that the cases be joined. Accordingly, *Belden* is not dispositive, and the scenario before the Court of Appeals is not the run-of-the-mill joining of a party as a defendant.

For the same reasons, the circuit court's order impacts a substantial right because the plaintiffs' right of election is a substantial right. Though the Court of Appeals concluded simply that the circuit court's order "is akin to adding parties to litigation or granting a motion to change venue" and thus does not impact a substantial right, it did not address Arender and USX's arguments *why* the circuit court's order impacts a substantial right. Specifically, the Court of Appeals overlooks that the circuit court's order does not simply add a defendant, it forces the plaintiff—over that plaintiff's objection—to add a defendant against whom he did sue. It is settled law that a plaintiff's right of election is a substantial right, having "been recognized in South Carolina jurisprudence for almost two hundred years." *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479, 487 (2017) (citing *Little v. Robert G. Lassiter & Co.*, 156 S.C. 286, 287, 153 S.E. 128, 128

(1930)). If Cozby wanted to sue Arender and USX he had ample opportunity to do so: he could have sued them in his original complaint or moved to amend his complaint to bring claims against them. He did not do so and, as discussed herein, opposed Oliver and Thompson's request for joinder. Neither Cozby—the architect of his case—nor Arender and USX wish for Arender and USX to be involved in the Cozby Action. The circuit court's order nevertheless compels such a joinder. The order thus infringes on Cozby's substantial right of election and is thus immediately appealable.

II. The Court of Appeals misapprehends or overlooks that the circuit court's order interferes with Arender and USX's substantial right to a particular mode of trial.

Arender drove for USX at the time of the underlying vehicle accident. Likewise, Oliver drove for Thompson, and Ouellette drove for Quality. Thus, the Workers' Compensation Exclusivity Doctrine "precludes [these] employee[s] from maintaining a tort action against [these] employer[s] where the employee[s] sustain[] a work-related injury." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 224, 661 S.E.2d 395, 403 (Ct. App. 2008). The Court of Appeals concluded that the circuit court's order would not present problems with the Workers' Compensation Exclusivity Doctrine because it found "no new creation of any claims nor any requirement for an employee to maintain tort actions against an employer. Trying the cases together would not require the employee-plaintiffs to add claims against their employers, who are defendants for other drivers involved in the accident." [Order at 7.]

The Court of Appeals' conclusion overlooks the practical reality of the joinder order. By operation of the joinder order, Arender is now a plaintiff in the same action where his employer, USX, is a defendant. The circuit court order is entirely silent as to how the claims in these three cases will coexist; though it purports to join all actions as one, it uses a consolidated—not joined—

case caption. The discord that will result from this silence is most apparent when one considers the content of a future verdict form. There is only one verdict form in a joined action. *See Sarvghad v. Sitton Buick Co.*, 312 S.C. 429, 430, 440 S.E.2d 894, 895 (Ct. App. 1994). The ultimate factfinder must take the verdict form an "apportion one-hundred percent of the fault between a plaintiff and each defendant whose actions are the proximate cause of the indivisible injury." *Smith*, 419 S.C. at 553, 799 S.E.2d at 481 (citing S.C. Code Ann. § 15-38-15(C)(3)). Here, then, Arender will be identified as a "plaintiff" on the very same verdict form where USX, his employer, is identified as a "defendant." The same is true for Oliver and Thompson. This runs afoul of the Workers' Compensation Exclusivity Doctrine since Arender and Oliver *cannot* pursue tort claims against their employers and cannot be identified as "plaintiffs" on verdict forms where USX, Thompson, Quality, and DMX are identified as "defendants."

Similarly, Arender and USX will now be listed as "defendants" on the same verdict form that Cozby is identified as a "plaintiff," even though Cozby has not brought any claims against Arender and USX and presumably cannot recover any damages from these defendants.

"[T]he denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)." *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) (citing *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000)). "These cases not only permit, but indeed require, immediate appeal in the event of denial of a mode of trial to which one is entitled as a matter of right." *Flagstar*, 341 S.C. at 72, 533 S.E.2d at 333. USX here is entitled to a specific mode of trial where its employee cannot maintain a tort action against it, and Arender and USX both are entitled to a mode of trial where Cozby cannot appear to recover from either defendant as he as not sued them. The circuit court's order turns this right on its head as the verdict form requires Arender to appear as a plaintiff against

USX, its employee, and Cozby to appear as a plaintiff against Arender and USX, parties against whom he has brought no claim. Accordingly, the circuit court order impacts a substantial right and is immediately appealable.

CONCLUSION

For the reasons above, as well as those reasons articulated in its Initial Brief and Reply Brief, as well as those articulated by Arender in his additional petition for rehearing, Arender and USX respectfully submit the Court of Appeals misapprehended or overlooked certain arguments and facts that affect its Order. These parties respectfully request the Court grant its petition and hold a rehearing on the matter.

Respectfully submitted,

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Columbia, South Carolina

February 19, 2026

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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 Petition for Rehearing has been served on all counsel to this appeal. The brief has been served by email sent to the addresses below:

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February 19, 2026

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RE: Oliver v. Arender and U.S. Xpress, Inc.
Appellate No.: 2024-000742
Our File: 3729-13492

Dear Ms. Kitchings:

Please find attached for electronic filing a copy of the Petition for Rehearing and Proof of Service in the above-referenced matter. The $50.00 filing fee for the petition will be hand delivered to the Court of Appeals. Please let me know if anything further is required from Appellants concerning this filing.

Sincerely,

SWEENY, WINGATE & BARROW, P.A.

s/ Marshall C. Crane

Marshall C. Crane

MCC/baf
Enclosures
cc: All counsel of record