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

Petition for Rehearing

Dean and Tamala Arender, in their capacities as plaintiffs and appellants in the action they filed against Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Oullette, and DMX Transportation Services, Inc. (hereinafter, "the Arenders" or "Appellants" respectfully submit this petition for rehearing pursuant to Rules 221 and 240, SCRCP. The court issued its opinion on February 4, 2026. (Opinion No. 6134). This petition is timely per rule 221(a). The Arenders wish to preserve the arguments from their briefs for further review. In addition, the Arenders respectfully submit the Court may have overlooked or misapprehended parts of their argument.

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This is not a case where an appeal is filed following the grant or denial of a routine motion. This is not 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 similar nature. Indeed, counsel has been unable to find an order, appealed or unappealed, or a motion, granted or denied, of like kind and premised upon Rule 20, SCRCP. This Court's research is in accord, leading to the conclusion "we have found no published opinion in South Carolina reviewing the appealability of an order granting permissive joinder." Therefore, an assessment of the merits or effects of the order is required. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (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—note merely what it appears to be.").

Although the merits of the Arenders' appeal are not before the Court on the motion for reconsideration, the Court must consider the underlying errors of the circuit court in ruling on the issue of appealability. *Cf. Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73 n. 7, 533 S.E.2d 331, 333 n. 7 (2000) (recognizing that some analysis of the merits is necessary to determine issues of appealability). Review of this matter, because of the improper procedure utilized in effectuating the joinder, necessitates that the court look beyond the label assigned to the order and analyze not only its effects, but its merits and substance. In essence, the present action must be immediately reviewed due to the egregiousness of the circuit court's order.

The Court correctly adopted this approach and states "we look to the effect of the order on appeal before us." The Court, however, misapprehended or overlooked the full effect of the order and the improper procedure leading to that order. While at its simplest, the order appears akin to adding parties or granting a motion to change venue, the order does much more and does so by improper procedure. The circuit court specifically acknowledged its order was "not based on section 15-7-100." (R. p. 9). Likewise, the circuit court did not add parties; it joined whole actions. Review only of the effects, without consideration of the merits and substance of the Arenders' appeal, oversimplifies the issues at bar and misses the egregiousness of the errors that necessitate immediate review. The improper procedure, utilized to effect

a change in venue and joinder of whole actions, deprived the Arenders of an opportunity to meaningfully oppose the erroneous effects of the Thompson's motion and the court's order.

This saga began with a motion from the Thompson Defendants to "join and consolidate these cases around the one Cozby's [sic] here." (R. p. 253; R. p. 197 requesting the circuit court "grant Defendants' motion and join and consolidate [the actions]." During arguments before the circuit court, counsel for the Thompson Defendants directly stated, "we're not adding new parties." (R. p. 257). Incongruently, the Thompson Defendants' counsel further states "the real issue, I guess it boils down to venue." (R. p. 257). Counsel then proceeded into an argument regarding the antiquated right of a defendant to be sued in their home county. (R. p. 258). Continuing unprompted, however, counsel then forecloses arguments regarding a change of venue asserting "that's not an analysis respectfully what the court should be engaging in at this point." Then, in another about face, the Thompson Defendants argue, "I think I'm asking the court we filed for consolidation and joinder. I'm asking the Court for joinder." Review of the flawed procedure, its effects, and the merits of the Arenders' arguments reveals the necessity of immediate review.

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The Court appears to have overlooked that a trial court's decision to allow a defendant to join other parties and actions has the effect of overriding the repeatedly declared legal right of a plaintiff to elect its defendants and revokes well recognized procedure. An intermediate appeal is necessary to expedite the final determination

of this litigation. The order impacts the Arenders' well-recognized and substantial right to elect their co-plaintiff and their defendants and directly impacts the merits of the action; the order must be immediately reviewed.

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).

Here, an analysis of the circuit court's order beyond its title or its stated effects reveals deeply flawed procedure that necessitates immediate reversal. A defendant may not join parties, let alone actions, through Rule 20, SCRCP. While the Thompson Defendants and circuit court both made vacillating arguments with vacillating reasoning, both consistently and unreservedly relied upon Rule 20, SCRCP, to request, and, for the court, to grant, a motion to join whole actions. Such action is so far outside the bounds of the Rules of Civil Procedure that the order of the Court must be overturned on intermediate appeal.

As discussed in greater detail in the Arenders' Brief to this Court, the 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, and it permits plaintiffs join more than one defendant. Rule 20(a), SCRCP. However, Rule 20,

SCRCP, provides no mechanism for the court to compel the joinder of parties, for 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 conceivably 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.*

This is not a question of discretion or interpretation; it is erroneous procedure consistently rejected by the Federal District Courts. *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 defendant "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.”).

Such a severe error necessitates immediate reversal. When the Rules are cited in support of errors so egregious as to take them fully out of the realm of the rules, the error inherently affects a substantial right of the plaintiff. A plaintiff has a substantial right to have litigation proceed within the bounds of the Rules.

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The Court appears to have overlooked that *Simon v. Strock* supports immediate appealability, not only because the supreme court heard the appeal in an interlocutory posture, but also because it articulates the substantial right affected by the order that makes the order immediately appealable. 209 S.C. 134, 138, 39 S.E.2d 209, 210 (1946). There, the supreme court heard the appeal immediately 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."[1] *Id.* at 138-39, 39 S.E.2d at 210-11.

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The Court appears to have overlooked the Arenders' argument regarding the structure of the action. 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. (R. p. 15). The caption shows three separate actions as if they were consolidated; the only difference now is that there is only one case number. (R. p. 15). Ascertaining how the various claims work together in one action proves

[1] 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* Plaintiff's Brief section I.c.

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). This error necessitates immediate review.

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The Thompson Defendants moved for consolidation and joinder of the Cozby action, the Arender action, and the Oliver action around the Cozby action in Sumter County. At oral arguments, counsel for the Thompson Defendants acknowledged that actions cannot be both consolidated and joined, and thereafter asked only for joinder under Rule 20(a), SCRCP, but continued to rely upon the factors controlling consolidation. (R. p. 257 (counsel for the Thompson Defendants, "All we're doing is trying to consolidate all the parties around one another."); R. p. 281 (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."); R. p. 284 (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. The order, nonetheless, assessed the motion under standards applicable to motions to consolidate and conflates, at the direction of the Thompson Defendants, the requirements for joinder and the requirements for consolidation and under Rule 42(a), SCRCP. (R. p. 10 ("Joinder is desirable for the parties and the court."); R. p. 11 ("The Court agrees with Thomson 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…."); R. p. 12 ("the court finds the benefits of joinder outweigh any concerns associated with a single trial.")).

Consolidation is a discretionary matter for the court to decide only after the moving party has met their burden. *See Keels v. Pierce*, 315 S.C. 339, 343, 433 S.E.2d 902, 904 (1993). The same is not true for compelling joinder. The order concludes that joinder "would prevent duplicative litigation, save the parties from incurring unnecessary costs, and conserve judicial resources." (R. p. 10). In a motion for consolidation of cases, "the moving party has the burden of persuading the court that consolidation is desirable." *See Keels v. Pierce*, 315 S.C. 339, 342 (Ct. App. 1993)

(citing *Prudential Insurance Co. v. Marine National Exchange Bank*, 55 F.R.D. 436 (E.D. Wis. 1972)). However, "general considerations of efficiency or convenience of parties or witnesses do not require joinder under rule 19" or rule 20. James F. Flanagan, *South Carolina Civil Procedure* 160 (3d ed. 2010).

While the Arenders raise several discrepancies on appeal, the crux of their argument is that Rule 20, SCRCP, is a wholly inappropriate vessel to effectuate the Thompson Defendants' desires. In essence, the Thompson Defendants moved for, and the court granted, an order allowing the Thompson Defendants to compel joinder because "the requirements of Rule 20(a) are satisfied, and the [c]ourt may exercise its discretion to join these cases." The Thompson Defendants and the court argue joinder under Rule 20 is permissive and therefore may be compelled by the court upon the motion of a Defendant. Such argument is incorrect and has no basis in the Rules of Civil Procedure or the law. The inappropriateness of the motion and order is the reason why no appellate cases address the immediate appealability of an order granting or denying a defendant's motion to join multiple actions in a different venue.

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 or the joinder of whole actions and provides no mechanism for a Defendant to move for joinder.

Joinder may be "compelled only if the strict requirements of Rule 19 are met." Flanagan, *supra*, at 168. 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 are met. "Ordinarily, the defendant cannot force another joint tortfeasor into the litigation." *Id.* "In rare circumstances, others must be joined because Rule 19 requires the presence of a particular person for complete resolution of the matter." *Id.* 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.

The circuit court acknowledged the Arender's 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. As a general statement of law, that is correct, but only as to joinder proposed by a plaintiff. Rule 20 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. That error necessitates immediate review.

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As outlined above, the Court may have overlooked or misapprehended certain portions of the Arenders' arguments. Therefore, the Arenders respectfully request the Court grant this petition and issue an opinion finding the issues raised by the Appellants are immediately appealable and reversing the order of the circuit court.

s/ James D. George, Jr.__________

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