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JUN 24 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity and Circuit Court Judge for Beaufort County  
Case No.: 2011-CP-07-02216

Appellate Case No.: 2012-213582

HELENA P. TIRONE AND TRUMAN'S ECLECTIC IRISH PUB, INC..... Respondents

-vs.-

THOMAS W. DAILEY.....Appellant

RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING

Respondents hereby make the following Return to Appellant's Petition for Rehearing. Respondents oppose the Petition for the following reasons:

1. Respondent's Petition for Rehearing is untimely. Under Rule 221(a), SCACR, "[p]etitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion . . . of the court." The Opinion in this case was filed on May 28, 2014, and the Petition for Rehearing was not received by the Court until June 16, 2014. Accordingly, the Petition for Rehearing was not actually received by the court within fifteen (15) days from date the opinion was filed on May 28<sup>th</sup>.

2. Appellant argues in his Petition for Rehearing that the trial court's order granting summary judgment to Helena Tirone and dismissing her from the case was not immediately appealable because it did not involve the merits of the case. Petition p. 1. ("the Trial Court's Order Granting Summary Judgment was not immediately appealable . . .") However, on January 9, 2013, in answering this Court's request for a response regarding the appealability of the orders challenged, Appellant took the position that an order that "has the effect of dismissing Helena Tirone as a party to this lawsuit . . . is an order 'involving the merits' of this case." See Appellant's Letter to Court of Appeals dated January 9, 2013.

3. Because Appellant never argued that the trial court's order did not involve the merits of the case, it is impossible that he preserved this argument for appeal. If it was not appealed and argued, it must have been waived.

4. Notwithstanding Appellant's prior inconsistent position and argument that has, in any event, been waived, the trial court's summary judgment order was immediately appealable. An order granting a motion for partial summary judgment is immediately appealable if it involves the merits of a case. S.C. Code Ann. § 14-3-330; Nauful v. Milligan, 258 S.C. 139, 187 S.E.2d 511 (1972). Indeed, under S.C. Code Ann. § 14-3-330, any intermediate order involving the merits of the case or that affects a substantial right is immediately appealable. S.C. Code Ann. § 14-3-330(1) and (2). The Order filed on August 10, 2012, completely dismissed Respondent Helena Tirone as a party to the instant lawsuit, and absolved her of any individual liability whatsoever, and thus was an order involving the merits of the case.

5. This Court did not overlook evidence relating to the Rule 60(b), SCRCP, factors. As addressed in detail in Respondents' Brief in Argument II, there simply is no newly discovered evidence. In fact, Appellant failed to show he could meet even one of the five elements he had to establish to be entitled to relief under Rule 60(b).

6. Appellant is using this Petition for Rehearing, and more specifically Section II, as an end run to around this Court's decision to deny his Petition to File a Reply Brief Out of Time. A comparison of the two documents establishes that the vast majority of Section II of the Petition for Rehearing was copied directly from Appellant's Initial Reply Brief. Having failed to timely file a Final Reply Brief and having failed to obtain leave to file his reply brief out of time, Appellant cannot now convert a Petition for Rehearing into his Final Reply Brief. In any event, the Court stated in its Opinion that the analysis contained in the Reply Brief would not have altered the Court's decision.

7. Appellant argues that this Court failed to address his "issue of a continuance" and "the amendment of his pleadings." Appellant is attempting to have this Court rule upon two issues that were never raised to or ruled upon by the trial court. A review of the summary judgment order reveals that the trial court never addressed the purported request for a continuance or amending the pleadings. This was likely because Appellant did not follow the proper steps in seeking either. Regardless, the trial court never ruled on these issues, and Appellant never filed a Rule 59(e), SCRCP, motion to obtain a ruling on these issues. If Appellant believed that he filed a proper Motion for Continuance and Motion to Amend, he was then required to file a timely Rule 59(e), SCRCP, motion asking the lower court to rule upon these issues to preserve them for review, even if the Order filed on August 10, 2012, were not immediately appealable.

Appellant did not do so. Finally, Respondents' Brief - Argument Sections IV and V analyze why these motions were never properly made, why a request for a continuance of the hearing, if properly made, should have been denied and why a Motion to Amend, if properly made, should have been denied.

For these reasons, Respondents ask this Court to deny Appellant's Petition for Rehearing in the above-captioned matter.

Respectfully submitted,

TWENGE + TWOMBLEY LAW FIRM

BY:

*Ashley Twombly* by *Ben D. Rose*  
~~J. ASHLEY TWOMBLEY~~ (with express permission)  
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ATTORNEYS FOR RESPONDENTS

Beaufort, South Carolina

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HELENA P. TIRONE AND TRUMAN'S ECLECTIC IRISH PUB..... Appellants


-vs.-

THOMAS W. DAILEY ..... Respondent

CERTIFICATE OF SERVICE

The undersigned, Andrea Smith, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Respondents, and that on the 24th day of June 2014 a true and accurate copy of the attached Respondent's Return to Appellant's Petition for Rehearing was placed in an envelope with first class postage thereon prepaid through the United States Postal Service and mailed to the following:

André DuBose Rembert, Esquire  
17 Clemson Street  
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Attorney for Appellant

BY:   
Andrea Smith, Paralegal to  
TWENGE + TWOMBLEY LAW FIRM

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J. Ashley Twombly\*  
Karl D. Twenge  
Jennifer I. Campbell+

\*Licensed in SC + GA  
+Of Counsel

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SC Court of Appeals

**Via Hand Deliver**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
S.C. Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

**RE: Helena P. Tirone et al. v. Thomas Dailey  
Appellate Case No.: 2012-213582**

Dear Ms. Kitchings:

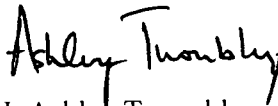

Please find enclosed an unbound original and seven (7) copies of Respondents' Return to Appellant's Petition for Rehearing and Certificate of Service regarding the referenced matter. I would appreciate it if you would file the original and six copies and return one clocked copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving the same upon counsel for Appellant.

Thank you for your consideration in this matter. If you have any questions, please do not hesitate to contact me.

With kindest regards, I remain,

Cordially,

 by   
J. Ashley Twombly

cc: Ms. Helena P. Tirone  
André DuBose Rembert, Esquire