

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

Appellate Case No. 2012-213582

Helena P. Tirone and Truman's Eclectic Irish Pub, Inc.

Respondents,

v.

Thomas W. Dailey

Appellant.

REPLY TO RESPONDENTS' RETURN

André Dubose Rembert
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Attorney for Appellant

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SC Court of Appeals

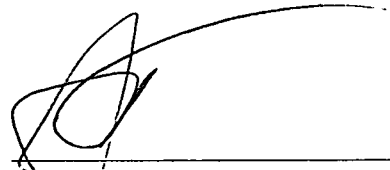
Appellant submits the following in Reply to Respondents' Return (paragraph numbers correspond to Return's paragraph numbers):

1. Appellant's Petition was timely filed per Rule 221(a), SCACR. The Court's order was issued on May 28, 2014, and Appellant's Petition was actually received by this Court on June 12, 2012 (file-stamped cover page attached as Exhibit A).
2. The Respondents misstate Appellant's argument in his January 9, 2013, letter to this Court regarding appealability (a copy [w/o enclosures] is attached to this Reply as Exhibit B). This letter, which speaks for itself, only addresses the appealability of the Trial Court's order on Appellant's Rule 60 motion.
3. The immediate appealability of the Order Granting Summary Judgment was not specifically before this Court until its opinion. As this issue of appealability is jurisdictional, it can be addressed at any time. E.g. Carter v. State, 329 S.C. 355, 495 S.E.2d 733 (1998); see also Amisub of S.C. v. Passmore, 316 S.C. 112, 447 S.E.2d 207 (1994) (lack of subject matter jurisdiction cannot be waived).
4. It is the Respondents who are now taking a position inconsistent with their prior arguments. The Respondents do not distinguish Thornton, and furthermore *Respondents do not deny that they presented this case to the Trial Court on December 7, 2012, to support their position that the Order Granting Summary Judgment was not immediately appealable* (See Petition n. 1). The Respondents also do not distinguish McLeod, which is significant in light of its similarities to this case.
5. Paragraph 5 of Respondents' Response is a conclusory statement, and this argument is thus abandoned. See Wilson v. Dallas, 403 S.C. 411, 449, 743 S.E.2d 746, 767 (2013) (noting an

argument is effectively abandoned if the appellant's brief treats it in a conclusory manner). Appellant's Petition for Rehearing speaks for itself – it is abundantly clear a “scintilla” of evidence (newly-discovered and old) exists in the Record, warranting reversal.

6. Appellant is required by the rules to present any points overlooked or misapprehended by the court in a Petition for Rehearing. See Rule 221(a), SCACR. This is true even if the points in question are similar to prior arguments.
7. To preserve an issue for appeal, the issue must have been raised to and ruled upon by the trial court. E.g. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). Oral motions, such as motions for directed verdict, motions to strike, motions in limine, motions for mistrial, and many others, are routinely made orally and denied orally by trial courts and are later considered by appellate courts. A Rule 59, SCRCPP, motion is not needed when the order is ruled upon by the judge on the bench. See Id. (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.”). Appellant's Motion to Continue the Summary Judgment hearing was made in open court, in accordance with Rule 7(b)(1), SCRCPP. (R. pp. 341-42). Appellant's Motion to Amend was made in writing and orally in open court, in accordance with Rule 7(b)(1), SCRCPP. (R. pp. 215, 324, 341). It was part of Appellant's Motion to Reconsider that was denied *in toto* by the Trial Court. Both of these motions are properly before this Court for review.

Accordingly, Appellant would renew his request of this Court to grant rehearing and issue an amended Opinion reversing the Trial Court, thus allowing a new, full, and fair hearing on the merits of Respondent Tirone's Motion for Summary Judgment



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27 June 2014

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

Appellate Case No. 2012-213582

Helena P. Tirone and Truman's Eclectic Irish Pub, Inc.....Respondents,

v.

Thomas W. Dailey.....Appellant.

PETITION FOR REHEARING

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SC Court of Appeals

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9 January 2013

Ms. V. Claire Allen
1015 Sumter Street
Columbia, SC 29201

Re: Helena P. Tirone v. Thomas Dailey
Appellate Case No. 2012-213582

Dear Miss Allen,

At the request of your letter dated 31 December, 2012, I offer the following as regards the appealability of the orders challenged:

The denial of a motion under rule 60, SCRCP, is immediately appealable. *Ex parte Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals*, 340 S.C. 57, 530 S.E.2d 383 (2000) (citing *Winesett v. Winesett*, 287 S. C. 332, 338 S.E.2d 340 (1985)). Dailey is appealing the denial of his Rule 60, SCRCP, motion, and is thus entitled to immediate review by this Court.

Furthermore, orders that "finally determine some substantial matter forming the whole or a part of some cause of action or defense" are immediately appealable under S.C. Code § 14-3-330, as such an order "involves the merits". *Mid-State Distributors, Inc. v. Century Importers, Inc.* 310 S.C. 330, 426 S.E.2d 777 (1993). Orders that "discontinue an action, prevent an appeal, grant or refuse a trial, or strike out an action or defense" are likewise immediately appealable under section 14-3-330 as they affect a "substantial right". *Mid-State*.

Dailey's Motion to Reconsider was the only proper manner in which to challenge the denial of Dailey's Motion for Summary Judgment because deposition testimony of Helena Tirone became available after the denial of Dailey's Motion for Summary Judgment (See Exhibit A - Motion to Reconsider). Judge Dukes' denial of Dailey's Motion to Reconsider has the effect of dismissing Helena Tirone as a party to this lawsuit. thus it is an order "involving the merits" of this case. Furthermore, as the transcript from the July 31, 2012 hearing will show, Judge Dukes' decision is ambiguous as to Dailey's future entitlement to pursue supplemental proceedings, and thus affects a "substantial right". Accordingly, even if a Rule 60, SCRCP, motion were not immediately appealable, the one before this Court most definitely is.

As to remaining orders (on the motion to amend, motion for protective order, etc.), an order not immediately appealable will nonetheless be considered if there is an appealable issue before the appellate court.

Sincerely,

André Rembert, Esq.

cc: J. Ashley Twombly

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
CIRCUIT COURT
Marvin Dukes
Master-in-Equity

Case No.: 2011-CP-07-02216
Appellate Case No. 2012-213582

Helena P. Tirone and Truman's
Eclectic Irish Pub, Inc,..... Respondent,

v.

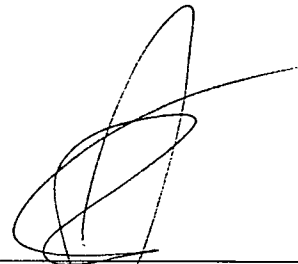
Thomas W. Dailey.....Appellant.

PROOF OF SERVICE

I, André Rembert, attorney for the Appellant, certify that I have served opposing counsel in this action by serving a copy of the pleading(s) herein below specified by mailing a copy of the same by 1st Class Mail to the following on the date listed below:

Pleadings: REPLY TO RESPONDENTS' RETURN

Party Served: J. Ashley Twombly
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 TWENGE + TWOMBLY LAW FIRM
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Attorneys for Appellant

Dated: June 27, 2014