THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III
Master-in-Equity

Unpublished Opinion No. 2014-UP-203 (S.C. Ct. App filed May 28, 2014)

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

v.

Thomas W. Dailey ....Petitioner.

PETITION FOR WRIT OF *CERTIORARI*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CERTIFICATE OF COUNSEL 1

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT 3

I. The Court of Appeals erred when it affirmed the order of the trial court granting summary judgment to Helena P. Tirone due to what it determined to be untimeliness of the appeal.. 3

II. The Court of Appeals erred when it affirmed the order of the trial court granting summary judgment to Helena P. Tirone due to overlooking the evidence supporting Appellant's Rule 60 Motion. 5

III. The Court of Appeals erred when it affirmed the order of the trial court granting summary judgment to Helena P. Tirone by not addressing the issue of a continuance for the Motion for Summary Judgment hearing or the amendment of his pleadings. 8

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Beathea v. Floyd, 177 S.C. 521, 181 S.E. 721, 724 (1935) 4

Ex parte Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals, 340 S.C. 57, 530 S.E.2d 383 (2000) 3

Lanier v. Lanier, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) 4

McCabe v. Sloan, 184 S.C. 158, 191 S.E. 905, 909 (1937) 5, 6

State ex rel. McLeod v. C & L Corp., Inc., 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984) 3

State v. Funderburke, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968) 5

Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316 (Ct.App.1984) 4

Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011) 2

Winesett v. Winesett, 287 S. C. 332, 338 S.E.2d 340 (1985) 3

Statutes

S.C.Code §§ 48-20-10 to -310 2

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 4, 2014.

QUESTIONS PRESENTED

I. Did the Court of Appeals err when it failed to recognize this particular order granting summary judgment was not immediately appealable, but that it was made immediately appealable by the appeal of the motion to reconsider?

II. Did the Court of Appeals err when it affirmed the order of the trial court granting summary judgment to Helena P. Tirone due to overlooking the evidence supporting Appellant's Rule 60 Motion?

III. Did the Court of Appeals err when it affirmed the order of the trial court granting summary judgment to Helena P. Tirone by not addressing the issue of a continuance for the Motion for Summary Judgment hearing or the amendment of his pleadings?

STATEMENT OF THE CASE

This is a business dispute between ex-lovers. Respondents Helena Tirone and Truman's Electic Irish Pub, Inc. filed suit against Appellant Thomas Dailey on May 20, 2011. (R. p. 219). Dailey answered the Complaint and asserted Counterclaims on June 3, 2011; this pleading was amended twice. (R. p. 197; 219). On June 25, 2012, Respondent Tirone filed a Motion for Summary Judgment seeking to have Respondent Helena Tirone dismissed as a defendant, though not seeking dismissal of any causes of action. (R. p. 213(a)[1]). Appellant Dailey was deposed on May 9, 2012 (8 hours) and again on May 16, 2012 (1.5 hours); Respondent Tirone / Respondent Truman's was deposed on July 27, 2012. (R. p. 395).

Tirone's Motion for Summary Judgment was heard on July 30, 2012. (R. p. 339). The deposition transcript for Tirone was unavailable at that time, and Dailey's attorney moved that the hearing be continued to introduce her deposition. (R. p. 341, lines 18-25; R. p. 231, lines 5-11). The trial court denied Dailey's Motion to Continue the hearing by granting Tirone's Motion for Summary Judgment by order dated August 10, 2012, dismissing Tirone as an individual defendant, but not dismissing any causes of action. (R. p. 13). Tirone's transcript became available on August 21, 2012, and on September 13, 2012, Dailey made a Motion to Reconsider the order granting summary judgment (R. p. 324). The trial court denied this motion by order dated December 7, 2012. (R. p. 18). Dailey filed his Notice of Appeal on December 7, 2012.

The Court of Appeals affirmed the judgment of the Circuit Court on May 28, 2014. (R. p. 515). Petitioner's petition for rehearing was denied on September 4, 2014. (R. p. 538). Petitioner now seeks a writ of *certiorari* for this Court to review the Court of Appeals' opinion.

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[1] The record on appeal contains two page 213(s).

ARGUMENT

Significant and manifest errors in the Court of Appeals' opinion demand review by this Court. First and foremost, the Order Granting Summary Judgment was properly before the Court of Appeals, and it refused to consider this order in contravention of long-established case law.. Next, the Court of Appeals has overlooked evidence pertinent to Appellant's Rule 60 motion. Finally, the Court of Appeals appears to not have directly addressed several of Appellant's issues on appeal. These errors, collectively and individually, have robbed the Petitioner of a full and fair hearing and justify the issuance of a Writ of *Certiorari.*

I. The Court of Appeals erred when it affirmed the order of the trial court granting summary judgment to Helena P. Tirone due to what it perceived to be untimeliness of the appeal.

The Court of Appeal's Opinion appears to hold that consideration of the Trial Court's August 10, 2012, Order Granting Summary Judgment was immediately appealable, and that the Court of Appeals has no jurisdiction because the Notice of Appeal was not served within 30 days of the written entry of the order. However, the Trial Court's Order Granting Summary Judgment was not immediately appealable, and only became so when the Trial Court issued its immediately appealable December 7, 2012, Order denying Appellant's Motion to Reconsider under Rule 60, SCRCP.

Not all orders granting summary judgment are immediately appealable, and the Court of Appeals failed to consider the relevant case law that bears upon this action. The Court of Appeals overlooked Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011).[2] In Thornton, the plaintiffs brought actions for negligence, strict liability, and nuisance.

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[2] It is worth noting that the Respondents presented this case to the Trial Court during a December 7, 2012, conference call to support *the Respondents'* argument that the Order Granting Summary Judgment was not immediately appealable.

While the plaintiffs did not assert a private cause of action under the Mining Act, S.C.Code §§ 48-20-10 to -310, they did assert violations of the law as part of their negligence claim. The trial court issued an order granting summary judgment as to any private right of action under the Mining Act. The Court reasoned that since the allegations of the violation of the Mining Act were fairly encompassed within the negligence cause of action, no substantial matter forming the whole or a part of some cause of action or defense. Thornton, 391 S.C. at 306-7. Thus, the order was not "on the merits" and thus not immediately appealable. Id.

The Court of Appeals also overlooked State ex rel. McLeod v. C & L Corp., Inc., 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984), an action brought by the Attorney General under the Unfair Trade Practices Act against a corporation and its two principals. The trial court in McLeod dismissed the two individual defendants; the Attorney General did not appeal the dismissal until after a judgment was entered by the special referee in the case. Judge Bell, in his opinion, held:

> When multiple defendants are joined in the same action, an order dismissing some but not all of them is ordinarily not final or appealable. Upon appeal from the final judgment the appellate court may review any intermediate order involving the merits and necessarily affecting the judgment. As a general rule, notice of appeal from the final judgment brings before the appellate court prior unappealed orders and rulings which affect the judgment.

McLeod, 280 S.C. at 530-31 (citations omitted).

Both of these cases apply to this appeal. The Court of Appeals was presented with the dismissal of an individual party (Respondent Tirone), the principal of a party corporation (Respondent Truman's). However, no causes of action were dismissed. Appellant's allegations, and proof necessary to prove those allegations, are identical as to Respondent Tirone and Respondent Truman's. While Tirone was removed from the lawsuit, no substantial factual matter or legal argument of Appellant was dismissed, thus the case was not decided "on the merits". See

Thornton. In a scenario very similar to McLeod, this case continued as to the corporate party after its principal was dismissed, and was thus not immediately appealable. The Order Granting Summary Judgment remained unappealable until an appealable final judgment was obtained. This "final judgment" was the Order Denying Reconsideration, as 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)). Thus, the Order Granting Summary Judgment was properly before the Court of Appeals, and its ruling must be reversed.

II. The Court of Appeals erred when it affirmed the order of the trial court granting summary judgment to Helena P. Tirone due to overlooking the evidence supporting Petitioner's Rule 60 Motion.

Appellant respectfully avers that the Court of Appeals overlooked the evidence that supports the elements from Lanier v. Lanier, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) cited in its Opinion:

(1) will probably change the result if a new trial [hearing] is granted
(4) is material to the issue

To change the outcome of the action in Lanier, the newly-discovered evidence would have to be likely change the "preponderance of the evidence". In this case, the newly-discovered evidence need only change what is arguably the lowest evidentiary standard in South Carolina jurisprudence: a "scintilla of evidence". The ease of finding a scintilla of evidence[3] cannot be

[3] Judge Tommy Kemmerlin, the late Master-in-Equity for Beaufort County, has also noted the ease by which a summary judgment motion may be denied: "The sum total of eleven years of being reversed on almost every summary judgment motion appealed...convinces me that the Appellate Courts of this State view it appropriate to grant summary judgment only where a claim or defense is patently absurd..." Scott Moïse, *Drafting Summary Judgment Motions: "What part of scintilla don't you understand?" (Part 1: The Motion)*, South Carolina Lawyer (May 2013) at

overemphasized: this Court has defined a "scintilla" as "'a gleam,' 'a glimmer,' 'a spark,' 'the least particle,' 'the smallest trace.'" Beathea v. Floyd, 177 S.C. 521, 181 S.E. 721, 724 (1935).

A review of the Respondents' Brief, argument II.E, shows that the Respondents have effectively conceded six of the factors for piercing the corporate veil under Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316 (Ct.App.1984): failure to observe corporate formalities, insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, and non-functioning of other officers or directors.[4] The deposition of Tirone provides additional evidence supporting another factor: whether the corporation was grossly undercapitalized (R. p. 397). The Trial Court clearly had a "scintilla" of evidence before it supporting the Appellant's arguments.

(2) has been discovered since the trial [hearing]
(3) could not have been discovered before the trial [hearing]

Appellant did not have a transcript of Respondent Tirone's deposition available at Respondent Tirone's Motion for Summary judgment hearing on July 30, 2012. The Trial Court refused to continue the hearing to allow her deposition to be presented. By the time the Appellant received the deposition transcript on August 21, 2012, (22 days later, and over ten days after receipt of the written order), his only option for relief under the Rules of Civil Procedure was a Motion to Set Aside Judgment under Rule 60. The timing scenario presented to the Court of Appeals was primarily the result of the refusal of the Trial Court to consider relevant evidence and the court reporter's delay in providing it.

(5) is not merely cumulative or impeaching

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54. It is worthwhile to note that Judge Kemmerlin was referencing South Carolina's prior, more stringent, "genuine issue of material fact" standard.

The deposition testimony of Respondent Tirone is not cumulative. "Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point." State v. Funderburke, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968). In a case involving a new trial motion, using a standard very similar to that presented by the Respondents, this Court held:

> Cumulative evidence has been tersely defined as additional evidence of the same kind to the same point. It is apparent that there is a wide difference in meaning between the terms 'of the same kind' and 'to the same point', as used in the various definitions. Newly discovered evidence, to be cumulative, must not only tend to prove facts which were in evidence at the trial, but must be of the same kind of evidence as that produced at the trial to prove those facts. If it is of a different kind, though upon the same issue, or of the same kind on a different issue, it is not cumulative. Nor is evidence cumulative in the legal sense which, while tending to establish the same general result, does it by proof of a new and distinct fact. To render evidence subject to the objection that it is cumulative, in the legal sense, it must be cumulative, not with respect to the main issue between the parties, but on some collateral or subordinate fact bearing on that issue. * * * Newly discovered evidence raising a new ground of claim or defense is, of course, not cumulative, nor is evidence explaining an apparent conflict in or contradicting, evidence offered at the trial. Newly discovered evidence of admissions has been held not to be cumulative to evidence of facts and circumstances.
>
> McCabe v. Sloan, 184 S.C. 158, 191 S.E. 905, 909 (1937).

Tirone's testimony from her deposition is not cumulative of her responses to discovery, which were available at the Summary Judgment hearing. First, unsworn discovery responses (as were provided by the Respondents) are not of the same "kind" as oral testimony under oath and subject to cross-examination. Further, documentary evidence (the various documents produced during requests for production) is not of the same "kind" as oral testimony. Finally, the statements made by Tirone during her deposition constitute admissions, and are thus not considered cumulative. See Rule 801(d)(2), SCRE; McCabe, *supra*.

As the owner and sole officer of Truman's, Tirone was in the best position to testify as to its operations, and her testimony satisfied nearly every element of the Sturkie test. Had this

testimony been before a court, and had the court allowed all inferences for the non-moving party (here, the Petitioner), it is abundantly clear that a scintilla of evidence existed in support of veil piercing. Petitioner respectfully avers that the Court of Appeals overlooked these facts and requests reversal.

III. The Court of Appeals erred when it affirmed the order of the trial court granting summary judgment to Helena P. Tirone by not addressing the issue of a continuance for the Motion for Summary Judgment hearing or the amendment of his pleadings.

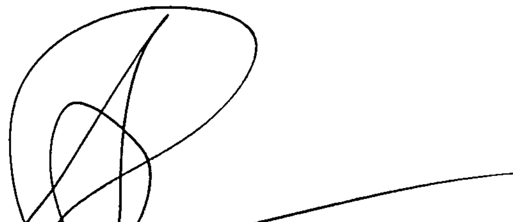
The Opinion does not directly address the issue of a continuance for the Motion for Summary Judgment hearing or the amendment of his pleadings. Because the denial of a Rule 60 motion is immediately appealable, and a denial of a motion to continuance is not, it is clear that the Appellant's motion to continue the Motion for Summary Judgment hearing under Rule 56(f), SCRCP, was properly before The Court, but the Court's order does not appear to address this issue (Section IV of Appellant's Brief). Petitioner would respectfully aver that this has been overlooked, and would this Court to grant rehearing and ask reversal of the Trial Court.

The Opinion also does not appear to address the issue of amendment (Section V of the Appellant's Brief). Petitioner would respectfully aver that this has been overlooked, and would ask this Court to reverse the Court of Appeals.

CONCLUSION

The Court of Appeals was presented with a variety of tools by which it may have corrected the unjust, "no-win" situation that the Petitioner found himself in the court below with an adverse decision and late arrival of the evidence that would reverse it. Reversing the Trial Court's ruling on Appellant's Rule 60, or Rule 56(f) motions, or Respondent Tirone's Rule 56 motion, would provide the parties to this action a new, full, and fair hearing on the merits of

Respondent Tirone's Motion for Summary Judgment. Petitioner would ask this Court to exercise its discretion to review the Court of Appeal's decision and reverse it.



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3 October, 2014

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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) hereinbelow specified by mailing a copy of the same by U.S. Mail to the following on the date listed below:

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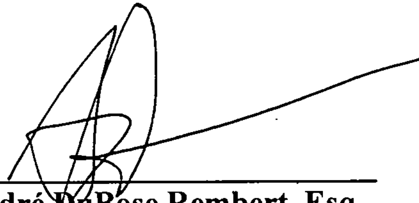

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