**THE STATE OF SOUTH CAROLINA**
**In the Supreme Court**

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**APPEAL FROM BEAUFORT COUNTY**
**Court of Common Pleas**

**Marvin H. Dukes, III**
**Master-in-Equity**

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**Unpublished Opinion No. 2014-UP-203 (S.C. Ct.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

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

**v.**

**Thomas W. Dailey .....Petitioner.**

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# APPENDIX OF PETITION FOR WRIT OF *CERTIORARI*
**Volume II**

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2. Did the trial court err when it issued a summary judgment order dismissing Respondent Tirone in spite of the scintilla of evidence of her individual liability present in the record?
3. Did the trial court err when it failed to continue the July 30, 2012 motion for summary judgment hearing in order to allow Appellant Dailey to introduce Respondent Tirone's deposition transcript into the record?
4. Did the trial court err when it failed to grant leave for Appellant Dailey to amend his pleadings to conform with the substantial evidence in the record?

## 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. (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).

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

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 without addressing it directly by virtue of granting Tirone's Motion for Summary Judgment by order dated August 10, 2012 (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.

## STATEMENT OF THE FACTS

Respondent Helena Tirone and Appellant Thomas Dailey met in late 2009 while working for the Fluor Daniel Corporation in support of the Logistics Civil Acquisition Program ("LOGCAP") in Afghanistan, a program that ran the bases for the military in the north the country. (R. p. 218). Tirone continues to work for Fluor at the Savannah River Site. (R. p. 218). Tirone and Dailey became romantically involved, and as a result Dailey shared with Tirone his dream and desire of opening an Irish-themed pub. (R. p. 203, 218). On or about December of 2010, Tirone and Dailey decided to become partners in a joint venture to open an Irish-themed pub known as "Truman's Eclectic Irish Pub" (named after Dailey's pet English Mastiff, Truman) in Beaufort, South Carolina. (R. p. 203, 218). In furtherance of this venture, Tirone and Dailey created a corporation, Truman's Eclectic Irish Pub, Inc. on December 29, 2010. (R. p. 218).

Tirone and Dailey's business relationship was in the nature of equal partners. (R. p. 203,

218). Due to Dailey's relatively modest financial situation, Tirone agreed to supply most of the financial backing and Dailey would supply most of the ideas, energy, contacts, knowledge, and labor (*i.e.* "sweat equity"). (R. p. 203, 218)

As the pub neared completion in April of 2011, Tirone and Dailey's romantic relationship ended. (R. p. 203, 218). Likely as a result of this change in relationship status, Tirone no longer desired to continue the venture as described above and sought to alter the venture to one in which she was the sole owner of the business, and Dailey ran the business as an employee. (R. p. 203, 218). In order to effectuate this change in the venture, Tirone and Dailey entered into a "Key Employee Employee Agreement" (the "Agreement") on May 4, 2011. (R. p. 91-96, 204, 218)

Dailey performed his duties under the Agreement after execution, but the professional relationship began to deteriorate (R. p. 204). During a preliminary safety inspection on or about May 16, 2011, the police arrived and stated a burglary was reported (R. p. 219). Dailey showed them a copy of his employment agreement and a copy of the lease, on which he was the guarantor, and they left (R. p. 219). Shortly thereafter, the police returned with Tirone's counsel and he was removed from the premises (R. p. 219). Tirone's complaint was filed on May 20, 2011, and that was the first time Dailey was informed he was terminated (R. p. 219).

On or about June 19, 2011, Tirone dismantled the business, removing furniture and rendering the location an empty shell (R. p. 219).

## STANDARD OF REVIEW

### Rule 60, SCRCP

Relief from judgment under Rule 60, SCRCP, rests within the sound discretion of the Circuit Court, and the Circuit Court's findings will not be disturbed on appeal absent an abuse of discretion. Thompson v. Hammond, 299 S.C. 116, 382 S.E.2d 900 (1989). "An abuse of discretion occurs if the court's ruling is controlled by an error of law or if the ruling is based upon findings of fact that are without evidentiary support." Browder v. Browder, 382 S.C. 512, 519, 675 S.E.2d 820, 823 (Ct. App. 2009). A circuit court's failure to exercise discretion is itself an abuse of discretion. In re Robert M., 294 S.C. 69, 362 S.E.2d 639 (1987).

### Rule 56, SCRCP

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Schmidt v. Courtney, 357 S.C. 310, 316-17, 592 S.E.2d 326, 330 (Ct. App. 2003); see also Laurens Emergency Med. Specialists, 355 S.C. 104, 108, 584 S.E.2d 375, 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party). If triable issues exist, those issues must go to the jury. Id.

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Id.; Rule 56(c), SCRCP. All ambiguities, conclusions, and inferences arising from the

evidence must be construed most strongly against the moving party. Id. see also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.").

Rule 15, SCRCP

A motion to amend is addressed to the sound discretion of the trial judge. Stanley v. Kirkpatrick, 357 S.C. 169, 592 S.E.2d 296 (2004).

## ARGUMENT

*Three days* after taking the deposition of Helena Tirone (the Plaintiff and principal of the other corporate Plaintiff), Defendant/Appellant Thomas Dailey was forced to defend her Motion for Summary Judgment without the benefit of her transcript. Tirone prevailed at this hearing. Had Tirone's transcript been available, or had the Circuit Court considered it after it had become available, it would have been abundantly clear that Tirone was not entitled to summary judgment, as she was a proper individual defendant. The Circuit Court's failure to consider this evidence constitutes reversible error and mandates reversal by this Court.

### I. The record contains substantial evidence that Helena Tirone is a proper defendant, both individually and after piercing the corporate veil.

The issue underlying both the Motion to Reconsider and the Motion for Summary Judgment are the acts of Helena Tirone that subject her to personal liability. South Carolina courts have outlined a two-prong test to determine whether a corporate veil should be pierced. The first part of the test requires an eight-factor analysis and looks to observance of the corporate formalities by the dominant shareholders. Sturkie v. Sifly, 280 S.C. 453, 457-58, 313 S.E.2d 316, 318 (Ct.App.1984). "The second part requires that there be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals." Id. In determining whether the corporate formalities were observed under the first prong of the Sturkie test, the courts consider eight factors:

(1) whether the corporation was grossly undercapitalized;

(2) failure to observe corporate formalities;

(3) non-payment of dividends;

(4) insolvency of the debtor corporation at the time;

(5) siphoning of funds of the corporation by the dominant stockholder;

(6) non-functioning of other officers or directors;

(7) absence of corporate records; and

(8) the fact that the corporation was merely a facade for the operations of the dominant stockholder.

Dumas v. InfoSafe Corp., 320 S.C. 188, 192, 463 S.E.2d 641, 644 (Ct.App.1995). "The conclusion to disregard the corporate entity must involve a number of the eight factors, but need not involve them all." Id.

Under the second prong of the Sturkie test, the party seeking to pierce the corporate veil must prove injustice or fundamental unfairness if the corporate veil is not pierced. Multimedia Publ'g of S.C., Inc. v. Mullins, 314 S.C. 551, 553, 431 S.E.2d 569, 571 (1993). "The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." Id. at 556, 431 S.E.2d at 573.

During the deposition of the Plaintiff, again, three days prior to the motion hearing, she was asked various questions regarding Sturkie 8-prong test requirements (the court in Sturkie forgot one of the prongs but it was later endorsed by the SC Supreme Court in Multimedia

Publishing of S.C., Inc. v. Mullins, 314 S.C. 551, 431 S.E.2d 569 (1993)). Her answers and documents turned over in discovery show the following:

(1) whether the corporation was grossly undercapitalized:

The Plaintiff acknowledged that outside of her signed loan agreement to the corporation, she did not disburse the amount of the agreement on the date signed but instead:

> Q: Did you put in $125,000 at the start or incrementally?
> A: Incrementally.
> Q: How did that work? He would just call you and say that he needed more money in the account?
> A: No, I put the first $50,000 in. I guess he would tell me things are running low or something like that, I guess.

(R. p. 397, lines 4-11). The original loan disbursement was not made in full, neither by her testimony nor in documentation provided during discovery.

(2) failure to observe corporate formalities:

a. No financial statement was prepared:

> Q: Has an annual financial statement ever been executed for Truman's?
> A: Martin did do some balance sheet, something else. I don't recall exactly what it is. It was never signed by a CPA or anything. I don't know if it is valid or not."

(R. p. 413, line 25- p. 414, lines 1-5)

b. No officers were elected.

> Q: Were board members ever elected or assigned positions?
> A: No, there's only one board member, and that would be me.

(R. p. 403, lines 6-9)

c. No records were kept, other than some receipts that she or an accountant **friend** of hers or her attorney may have in their possession:

Q: What records did you keep of Truman's other than bank records? Were there any?
A: There were receipts.
Q: What kind of receipts?
A: From things Mr. Dailey bought.
Q: So he would buy things, and then where did the receipts go to? Did he give them to you? Did he mail them?
A: He sent some to Martin, and he gave some to me.
Q: These are debit card receipts and ATM receipts and the like?
A: I don't recall what all they are. All I know is I have receipts.
Q: And you have them?
A: Mr. Twombley has them.

(R. p. 412, lines 2-18)

d. No bylaws were ever executed:

Q: There were never any by-laws or any paperwork having to do with the running of the company that were ever written?"
A: No.

(R. p. 412, lines 19-22)

(4) insolvency of the debtor corporation at the time:

No cash flow model had been prepared:

Q: What was the expected cash flow of the bar?
A: There was never a cash model made.

(R. p. 411, lines 11-13) and she disbursed money solely upon request by the Defendant, whom she claims was not even an employee.

(5) siphoning of funds of the corporation by the dominant stockholder:

The Plaintiff admittedly closed the corporate account and returned the funds to herself outside of the arrangements of the loan agreement she had signed.

> Q: How much is currently in the BB&T business account for Truman's?
> A: There is no current BB&T business account.
> Q: When did you close the account?
> A: I don't remember exactly.
> Q: What did you do with the funds when you removed them from the account?
> A: There weren't any funds in the account. There might've been-- I take that back. There might have been, like, 200 bucks."

(R. p. 414, lines 6-15)

(6) non-functioning of other officers or other directors:

The Plaintiff stated repeatedly that she was the sole owner and specifically the sole officer.

> Q: No officers were ever selected? You're the sole officer of the corporation?
> A: Yes.

(R. p. 413, lines 18-21)

(7) absence of corporate records:

No records were kept.

> Q: What records did you keep of Truman's other than bank records? Were there any?"
> A: There were receipts.
> Q: What kind of receipts?

A: From things Mr. Dailey bought.
Q: So he would buy things, and then where did the receipts go to? Did he give them to you? Did he mail them?
A: He sent some to Martin, and he gave some to me.
Q: These are debit card receipts and ATM receipts and the like?
A: I don't recall what all they are. All I know is I have receipts.
Q: And you have them?
A: Mr. Twombley has them.
Q: There were never any by-laws or any paperwork having to do with the running of the company that were ever written?
A: No.

(R. p. 412, lines 2-22)

(8) the fact the corporation was merely a facade for the operations of the dominant stockholder:

The Plaintiff repeatedly made clear that the corporation had no employees and that she was the sole owner, and, ipso facto, the corporate entity herself in all but name.

Q: Did you ever ask Mr. Dailey to be a part of the corporation?
A: No, it was capitalized with my money. I was the sole owner of the bar."

(R. p. 395, lines 3-6)

A: I capitalized the pub. I owned 100 percent.

(R. p. 396, line 15)

A: I was 100 percent ownership of the project. It was all my money. I capitalized everything.

(R. p. 405, lines 16-18)

Additionally, in regards to where the Plaintiff was a co-director of another corporation, she initiated action to repossess a van leased to the Plaintiff, without regard to the co-director because in her words:

A: It was my van. I paid for it."

(R. p. 407, lines 19-20)

As she has spoken that way about Truman's repeatedly throughout her deposition, that sheds light on her absolute refusal to participate in the corporate form in anything but name and has repeatedly acted at her personal discretion at all times, (R. p. 406 line 22-p. 408 line 15)

The second prong of Sturkie test simply states that after a sufficient number of the first prong have been shown that "The second part requires that there be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals." Sturkie, 313 S.E.2d at 318. Sturkie also states that "The burden of proving fundamental unfairness requires that the plaintiff establish (1) that the defendant was aware of the plaintiff's claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property." Id. at 319.

Plaintiff Tirone, in July 2011, well after the original answer and counterclaim of the Defendant, did knowingly and admittedly dismantle the business, hiring movers to empty the bar, thereby effectively destroying it:

Q: Did you, in fact empty the bar?
A: A U-Haul company emptied the bar.
Q: After the U-Haul company emptied the bar, what was left inside?
A: Miscellaneous items. I can't really recall what.
Q: Was it mostly an empty shell? You took most of the property out?
A: The things that I recovered under my security agreement were taken out.
Q: You signed a multi-year lease on the property. What was your plan?"

A: To open up a pub.
Q: After you emptied the pub, what was your plan moving forward?
A: I had no plan.

(R. p 410, lines 9-24) She also closed out the corporate accounts, in full knowledge of the claims against herself and the corporation, by the Defendant.

Q: You would say that you definitely shut down the Truman's business account after the initiation of this lawsuit?"
A: Yes.

(R. p. 415, lines 4-7)

**II. The Circuit Court committed a reversible error of law by not vacating or amending its earlier ruling based on newly-discovered evidence of Tirone's individual liability.**

The evidence set forth above from Tirone's deposition was not before the Circuit Court at the July 30, 2012, Motion for Summary Judgment hearing. At that hearing, the Master-in-Equity orally ruled for Tirone and requested a proposed order, which resulted in the Aug 10, 2012 order. When Dailey filed his Motion to Reconsider, he promptly presented the trial court with the evidence set forth above. This evidence creates the necessary scintilla of evidence that would have defeated Tirone's Motion for Summary Judgment. See Hancock v. Mid–South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("mere scintilla" needed to withstand summary judgment). As its prior order granting summary judgment was now invalid, it was incumbent on the trial court to vacate or amend its order. Its failure to do so was reversible error.

The case of Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991) is instructive here. In Baughman, the trial court granted the defendant partial summary judgment on several personal injury claims, finding there was no genuine issue of material fact

as to causation. After the grant of summary judgment, the Plaintiffs procured an expert that provided testimony that was relevant to the issue of causation and moved to have the summary judgment orders vacated. The trial court denied these motions, but the Supreme Court ultimately reversed, holding that the plaintiffs had "demonstrated a likelihood that further discovery will uncover additional evidence relevant to the issue of medical causation..." Id.

In this action, Dailey promptly provided the trial court with the necessary evidence relevant to piercing the corporate veil (See Section I). Considering that South Carolina only requires a showing of a scintilla of evidence on the part of a non-moving party to avoid summary judgment (see Section III), Dailey presented sufficient evidence to warrant reversal.

The trial court committed another error of law in possibly ruling that Dailey was not entitled to pursue supplemental proceedings post judgment. In an off-the-record discussion during the hearing concerning Summary Judgment, the court stated that supplemental proceedings to pierce the corporate veil were appropriate against the individual plaintiff to bring her back in, as it were, should the defendant's counterclaims against the corporate plaintiff be successful. The court based much of its decision to grant summary judgment to the individual plaintiff at that time because she could be brought back in in supplemental proceedings and so the issue of piercing the corporate veil was not yet ripe. The court had the plaintiffs' attorney draft the order. The order, as written, seems to preclude the possibility of supplemental proceedings against the plaintiff individually by virtue of ruling relatively demonstratively that facts to support veil piercing must be pled initially:

> While there is authority to support the idea that a party is not required to affirmatively plead veil piercing as a separate cause of action (and can in some instances attempt to pierce post-judgment), a party seeking to pierce the corporate veil is still required to set forth basic facts (as well as a request for relief) to put an individual on notice that it seeks to hold the individual liable for the debts of the corporation under a veil piercing theory. Rule 8(a), SCRCP; see also Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 104, 668 S.E.2d 798, 802 (2008) (finding that only when a party has "pled facts sufficient to survive a motion to dismiss as to the corporate liability claims and the alter ego claim, [should] the trial court move forward to determination of both matters.")
>
> Here, Dailey has filed three (3) separate counterclaim pleadings over the course of twelve (12) months: June 3, 2011; December 5, 2011 and June 21, 2012. Dailey has never alleged any facts to support a veil piercing theory or even requested that the corporate veil be pierced. Based on the above, Plaintiffs' Motion for Summary Judgment as to the individual liability of Tirone is hereby granted.

R. p. 12-13

As the court never ruled on the Defendant's motion to amend the answer and counterclaim to include those facts which would warrant piercing the corporate veil which was included in the defendants supporting memorandum and also requested orally at the hearing, it is arguable that supplemental proceedings against the individual plaintiff are not possible since the order states that the facts to support them were not included in the pleadings on record.

Additionally, the judge's off-the-record assessment that supplemental proceedings could be brought against the individual plaintiff were never clarified in the subsequent written order, and was also not ruled upon when addressed in Dailey's Motion to Reconsider, which respectfully pointed out the possible error in law made in regard to waiting to pierce the corporate veil post-judgment. As the Drury court found:

> While it is undoubtedly true that the corporate veil is often pierced post-judgment, it is also true that South Carolina courts frequently

> consider these issues in one bifurcated action.... We therefore decline to adopt a rule which would require South Carolina's trial courts to resolve in two separate actions what they now ably determine in one. Id. at 801

While the subject of whether supplemental proceedings could be taken against the plaintiff was discussed again orally during the hearing for the motion to reconsider, and the judge stated it could, it was simply dismissed via form 4, so there was no distinct ruling on the record.

On the one hand, Dailey respectfully submits that the Master made an error in law in basing his decision to grant summary judgment on the opinion that the time was not ripe for piercing the corporate veil which the Drury court has stated is not required, while, on the other, even if Dailey were to win against the corporation and attempt to pierce the corporate veil as the master suggested, the master's order, as written, would seem to preclude the possibility of doing so. This places Dailey in a difficult situation, as it is ambiguous as to whether he could pursue Tirone in supplemental proceedings when he obtains a judgment against Truman's. Either the trial court has ruled pre-judgment that supplemental proceedings are not proper since facts were not pled, or the trial court has failed to rule on allowing the pleadings to be amended. Either scenario is an abuse of discretion and warrants reversal.

**III. The Circuit Court committed a reversible error of law by granting summary judgment for Tirone, when the record clearly contains a scintilla of evidence of Tirone's individual liability.**

Even without the transcript of Helena Tirone, there was a scintilla of evidence in the record by the July 30, 2012, Motion for Summary Judgment hearing, and the trial court's grant of that motion was reversible error.

In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid–South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). While Tirone's transcript clearly provides this necessary scintilla, there was ample evidence in the record on the day of Tirone's Motion for Summary Judgment hearing (R. p. 226-231), and so the request for summary judgment should have been denied.

Even without the availability of the deposition, there was more than enough evidence on the record in regards to Tirone's actions individually through piercing the corporate veil that clearly provided the necessary scintilla of evidence required to defeat the motion for summary judgment. Following the Sturkie test, the record showed prior to the availability of the transcript:

(1) whether the corporation was grossly undercapitalized & (4) insolvency of the debtor corporation at the time. At the time of the suit, the business bank account had a balance of roughly $3,091.18 (R. p. 77). As of July 27th, at the plaintiff's deposition, all funds had been removed and the account closed by the plaintiff at an undetermined time prior. Additionally, Truman's Eclectic Irish Pub, Inc. "does not own any assets" (R. p. 284, line 8)

(2) failure to observe corporate formalities. Tirone signed the Agreement with Dailey as "Helena P. Tirone", not as "Helena P. Tirone, as president of Truman's Eclectic Irish Pub, Inc." (R. p. 257), whereas she had documented other signatures when signing for Truman's with "director" (R. p. 295, 296).

(5) siphoning of funds of the corporation by the dominant stockholder. Rather than investing equity in the business, Plaintiff Tirone executed a loan for $125,000 to the Corporation on or about January 21, 2011 (R. p. 295, 296). However, Plaintiff Tirone did not transfer the money to the Corporation's business account, instead dispensing funds on an as-needed basis, thus keeping the interest that would or could have accrued for the Corporation in her own personal accounts. Plaintiffs answer to Defendant's First Set of Interrogatories #11 ("Set forth a complete accounting of all capital contributions to Truman's Eclectic Irish Pub, Inc., and all expenditures made by Truman's Eclectic Irish Pub, Inc.") shows that Plaintiff Tirone only contributed $50,000 the day of the execution of the loan and $95,780 in total (R. p. 310).

(6) non-functioning of other officers or directors & (7) absence of corporate records. There are no corporate minutes, resolutions, bylaws, or even stock certificates from Truman's (R. p. 284, 291, 292). There is no record that Plaintiff Tirone has performed any of her duties as Owner, President, and CEO.

(8) the fact that the corporation was merely a facade for the operation fo the dominant stockholder. The Plaintiff has acted alone and solely with the intention of acting as the embodiment of Truman's.

Injustice and Fundamental Unfairness. The second part of the Sturkie test is easily achieved when the facts of the case is considered. Plaintiff Tirone, the only acting member of Truman's, has broken a written contract with an employee, signed May 4, 2011, and provided no proof to substantiate her claims of threat or duress. She has cleared out the bar (on or about June 19, 2011) and, apparently, sublet the location to another entrepreneur (date unknown). She has

emptied and closed the Truman's business account (since the initiation of this suit). As the court in Sturkie stated, "The burden of proving fundamental unfairness requires that the plaintiff establish (1) that the defendant was aware of the plaintiff's claim against he corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property." Sturkie, 313 S.E.2d 316 at 320.

Accordingly, as at the very least, a scintilla of evidence was met even without the deposition transcript being available, the circuit court erred in granting summary judgment to Helena Tirone and such error warrants reversal.

**IV. The Circuit Court committed a reversible error in refusing to grant Dailey's motion to postpone the summary judgment hearing in order to present further evidence.**

At the July 30, 2012, hearing for his Motion for Summary Judgment, Dailey's attorney requested that the Circuit Court postpone the hearing in order for him to obtain a transcript of his client's deposition testimony, both in his memorandum of law in support of the motions hearing (R. p. 216) and during the hearing itself:

> The Defendant asks for a continuation on the motion of summary judgment until the transcript of the deposition of Plaintiff can be submitted. The deposition was heard three days prior to this hearing and the transcript is not yet available. There were numerous statements made by the Plaintiff that will support...the Defendant's contention that Plaintiff Tirone is inseparable from Plaintiff Truman's Eclectic Irish Pub, Incorporated.

(R. p. 341 subset page 9, line 18- p. 342 subset page 10, line 9).

This request was made pursuant to Rule 56(f), SCRCP, which provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Although an affidavit is normally required to invoke the provisions of this rule, strict compliance with the technical requirements of Rule 56(f) is not required where the need for further discovery is otherwise made known to the trial court. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991) (citing First Chicago Int'l v. United Exchange Co., 836 F.2d 1375 (D.C.Cir.1988) and Snook v. Trust Co. of Ga. Bank of Savannah, 859 F.2d 865 (11th Cir.1988)). Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Id. (quoting Watson v. Southern Ry. Co., 420 F.Supp. 483, 486 (D.S.C.1975)). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Baughman at 543.

In this action, discovery was clearly incomplete, as the trial court judge did not even have the transcript of Helena Tirone, Plaintiff and principal of the corporate plaintiff, available for review. To not continue the hearing to, at the minimum, allow Dailey to present Tirone's deposition transcript to the trial court, is reversible error mandating reversal.

## V. The Circuit Court abused its discretion by refusing to allow Dailey to amend his pleadings, especially in light of the substantial evidence he presented to the court.

While Dailey believes that his pleadings fairly apprise the opponent of a desire to pierce the corporate veil, as his answer and counterclaim reference Helena Tirone in her personal capacity nearly exclusively, and also because by the questioning presented to her at her deposition laid out the elements of piercing the corporate veil, as did the memorandum filed for the Summary Judgment hearing and for the Motion to Reconsider, in an abundance of caution, he requested that the lower court allow him to amend his answer and counterclaims to conform to the evidence before the court (*i.e.* to more clearly allege that he seeks to pierce the corporate veil). (R. p. 325). This motion was not ruled upon, and was apparently denied.

Leave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party. Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E.2d 711, 716-17 (Ct. App. 2005). The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. Id. The party opposing the amendment has the burden of establishing prejudice. Id. This rule strongly favors amendments and the court is encouraged to freely grant leave to amend. Id.

By failing to rule on the Defendant's request to amend, the circuit court failed to exercise its proper discretion. A circuit court's failure to exercise discretion is itself an abuse of discretion. In re Robert M., 294 S.C. 69, 362 S.E.2d 639 (1987).

## CONCLUSION

Dailey asks this Court to reverse the orders of the Circuit Court and allow him to pursue and resolve his action in the most efficient and logical way possible, *i.e.* against all potential tortfeasors. Judge Dukes' December 7, 2012 order denying reconsideration and his August 10, order granting summary judgment should be reversed for any and all of the arguments set forth above, and Dailey should be allowed to amend his pleadings to conform with the evidence.

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8 July 2013

## CERTIFICATE OF COUNSEL

The undersigned, André DuBose Rembert, Esq., certifies that this Final Brief of Appellant complies with Rule 211(b).

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8 July 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

---

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

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

v.

Thomas W. Dailey.....Appellant.

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PROOF OF SERVICE

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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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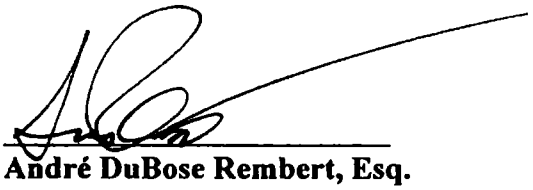

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**Dated: July 8, 2013**

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 Special Circuit Court Judge for Beaufort County

---

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

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

-vs.-

THOMAS W. DAILEY..... Appellant

---

# RESPONDENTS' FINAL BRIEF

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## STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court correctly granted Respondent Helena Tirone's Motion for Summary Judgment.

II. Whether the Circuit Court properly denied Appellant's Rule 60(b) motion since there is no newly discovered evidence.

III. Whether the Circuit Court properly granted summary judgment in favor of Respondent Helena Tirone.

IV. Whether the Circuit Court committed reversible error in refusing to grant Appellant's request to postpone the summary judgment hearing, which was made on the date of the hearing.

V. Whether the Circuit Court erred in refusing to allow Appellant to amend his pleadings for a third time since Appellant failed to file a proper Motion to Amend.

## STATEMENT OF THE CASE

Respondents, Truman's Eclectic Irish Pub, Inc. and Helena P. Tirone (Tirone), filed a Summons and Complaint against Appellant, Thomas Dailey (Dailey), on May 20, 2011. (R. pp. 21-25). Dailey filed an Answer and Counterclaim on June 3, 2011. (R. pp. 192-196). Dailey amended his Answer and Counterclaim two times, first on December 5, 2011, and again on June 21, 2012. (R. pp. 197-202 and R. pp. 203-213).[1]

On June 25, 2012, Tirone filed a Motion for Summary Judgment. (R. pp. 213(a)-214)[2]. A hearing was held on July 30, 2012. (R. pp. 339-342) On August 10, 2012, the Circuit Court granted Tirone's Motion for Summary Judgment. (R. pp. 11-17). On September 13, 2012, Dailey filed a motion styled as a "Motion to Reconsider;" however, the motion was made pursuant to Rule 60(b)(2), SCRCP. (R. pp. 324-338). The Motion

[1] Dailey was first represented by Larry Wayne Weidner, Esquire of Beaufort. Dailey was then represented by Jim Moss, Esquire, and then Fred Kuhn, Esquire, both of Beaufort. For a brief period of time, Dailey represented himself pro se. Dailey is now represented by André Rembert, Esquire of Charleston.

[2] The Record on Appeal has duplicate page numbers 213, so Respondent is referencing the duplicate page as 213(a).

to Reconsider was denied by the Circuit Court on December 7, 2012. (R. pp. 18-19). Dailey filed a Notice of Appeal on December 7, 2012.

## FACTS

Tirone and Dailey were involved in a romantic relationship. During the relationship, Dailey represented to Tirone that he was a fiscally responsible person, that he possessed business acumen, and that he was otherwise capable and able to oversee the opening of a restaurant/bar in Beaufort, South Carolina. (R. p. 378, lines 2-15). Based on these representations, Tirone agreed to enter into a business venture with Dailey to open an Irish themed pub and formed a corporation, Respondent Truman's Eclectic Irish Pub, Inc. (Pub). (R. pp. 252-253).

Dailey testified that he was responsible for essentially all aspects of the formation and organization of the Pub including what type of corporation would be formed (R. pp. 347-348), how the corporation would be formed (R. p. 346, line 22), where the business would be located (R. p. 348, lines 19-25), the type of business the corporation would engage in (R. p. 349, lines 1-5), and what type of insurance the business would need (R. p. 351, lines 1-13).

As preparations to open the Pub were underway, the romantic relationship began to fracture, which caused Respondents to closely examine the day to day operations of the business, including its bank accounts. The examination was not favorable to Dailey. (R. p. 398, lines 3-16; p. 401, lines 3-7; p. 419, line 24-p.420, line 13).

When Respondents began to query Dailey as to various business issues, Dailey became upset, decided that he needed "some type of protection," and determined that the only type of protection he could get was in the form of an employment contract. (R. p.

364, lines 6-16). Dailey drafted two Key Employee Employment Contracts and admits that the contracts had terms very favorable to him. (R. p. 358, line 17-p. 359, line 25; p. 367, lines 10-12). These very favorable terms included that the Pub (1) was required to or "shall" hire Dailey; (2) that once hired, Dailey would have "complete oversight, management and operational control" of the Pub including "hiring and firing" and "any other duties"; (3) that Dailey could not be terminated for any reason whatsoever; (4) that Dailey would be paid a salary for four (4) years irrespective of the success of the business; and (5) that if he were terminated, Dailey would receive a lump sum payment of his salary for the remaining term of the contract (up to $260,000.00) plus 50% of the stock of the corporation. (R. pp. 83-88; pp. 254-257; p. 368, line 25-p. 369, line 21). Dailey testified that even if he did something improper and deserved to be fired, he would still be entitled to "a quarter of a million dollars and half ownership interest in the company." (R. p. 368, lines 5-10). Dailey further testified that these terms were fair, despite the fact that Tirone has committed 100% of the capital to the corporation, and he had not contributed any. (R. p. 218; pp. 294-296; p. 310; p. 350, lines 5-17).

Through duress, threats and coercion, Dailey forced Tirone, acting on behalf of Respondent Truman's Eclectic Irish Pub, to sign the two Key Employee Employment Contracts. (R. pp. 22-25; pp. 26-40; pp. 41-191; p. 403, lines 4-14; p. 416, line 18-p. 418, line 1). The threats included a threat to contact Tirone's long time employer, the Fluor Daniels Corporation, and provide it with false information that would allegedly result in Tirone's termination. (R. p. 403, line 3-p. 404, line 1). As Dailey testified in his deposition, "I said I would embarrass her if she continues to embarrass me." (R. p. 387, lines 12-14; p. 388, lines 11-12).

During their review of the day to day operations of the business, Respondents discovered that Dailey was stealing money from Respondent Truman's Eclectic Irish Pub. (R. pp. 22-25; pp. 26-40; pp. 41-191; pp. 399, line 4-p.400, lines 1-15; p. 402, lines 4-6; p. 419, line 15-p. 420, line 10). For example, Dailey testified in his deposition that he would write a check from the business account of Respondent Truman's Eclectic Irish Pub, have a third party cash the check and then use the cash to pay Dailey's child support obligations. (R. p. 375, line 13-p. 376, line 2; p. 376, lines 12-p.377, line 6; p. 379, lines 1-17; pp. 442-443). As another example, Beverly Stanveck testified that Dailey tried to sell Pub equipment to her for cash. (R. pp. 441-442).

Tirone also became concerned because Dailey's representation about being a fiscally responsible person and possessing business acumen were turning out not to be true. For example, Respondents later discovered that: a) Dailey has a historical delinquency in making child support payments, and at the time he made the representation of fiscal responsibility, was over $4,000 in arrears in his child support obligations; b) Dailey had defaulted on three separate mortgage loans and had $871,152.29 worth of judgments against him; c) Dailey had defaulted on five other loan agreements with Central Star Credit Union and owes over $48,000.00 to Central Star Credit Union who had initiated five collections actions against him; d) Dailey has various creditors related to unpaid credit card accounts and unpaid cellular telephone accounts who are currently looking for him; e) Dailey had not filed a 2008, 2009 or 2010 personal tax return and his solely owned EBJ corporation had never filed a tax return; f) Dailey has previously filed Chapter 13 Bankruptcy, defaulted on his agreed upon plan to pay back his creditors, and then filed Chapter 7 Bankruptcy; and g) Dailey has been involved

in other civil lawsuits in which he was sued for personal fiscal issues. (R. pp. 50-51; p. 384, line 24-p. 285, line 4 (Deutsche Bank); p. 346, lines 9-12 (EBJ tax returns); p. 373, lines 12-16 (personal tax returns); p. 374, lines 18-24 (child support); p. 380, lines 1-15 (bankruptcy); p. 383, line 6-p. 386, line 13 (child support, MCAS, Deutsche Bank, Central Star); p. 389, lines 13-24 (bankruptcy); p. 390, line 25-p. 391, line 20 (bankruptcy); p.393, line 11-p.394, line 6 (other lawsuits and creditors calling)).

Respondent Truman's Eclectic Irish Pub, Inc., decided that it would be best for the parties to enter a cooling off period and informed Dailey that the locks to the building the business was leasing were being changed so that the parties could maintain the status quo while they discussed the path ahead for the Pub. (R. p. 370, line 19-p. 371, line 20). At that point in time, Dailey had been informed about locks being changed and the cooling off period, and Dailey did not have a key to the Pub building.

Thereafter, unbeknownst to Respondents, Dailey hired a locksmith, surreptitiously gained access to the Pub by telling the locksmith that he was a part owner in the building, and had the locks rekeyed such that he now held the only key. (R. 381, lines 7-21). When Respondents later discovered that someone was inside the building, the police were called, Dailey was ultimately removed from the building, and a temporary restraining order (TRO) was entered restraining Dailey from entering the building. (R. pp. 1-2).

On July 30, 2011, the original TRO was converted into an injunction and Dailey was enjoined from entering the building until further order of the court. (R. p. 7). Significantly, Dailey was also enjoined from contacting Tirone's employer for purposing of disparaging her. Id.

On October 13, 2011, the original injunction was expanded after Dailey came to the building in violation of the court's prior injunction order. (R. p. 9). In addition, a new injunction was entered after Dailey sent harassing text messages to Tirone saying the police were looking for her and threated to publish photos of Tirone in her underwear over the internet. (R. p. 10; pp. 387-388).

## ARGUMENT

### I. The Circuit Court correctly granted Respondent Helena Tirone's Motion for Summary Judgment

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." Melton v. Medtronic, Inc., 389 S.C. 641, 650, 698 S.E.2d 886, 891 (Ct. App. 2010). Under Rule 56(c), SCRCP, summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In the instant case, the Circuit Court properly granted summary judgment to Respondent Helena Tirone.

#### A. *Individual liability of Tirone under veil piercing*

Dailey first argues that Tirone faces liability based on a veil piercing argument. However, Dailey failed to include any facts to support veil piercing theories or allegations in his Answer and Counterclaim, First Amended Answer and Counterclaim, or Second Amended Answer and Counterclaims. Accordingly, the trial court properly granted Tirone summary judgment in her individual capacity regarding a veil piercing claim.

Rule 8(a), SCRCP, requires that all pleadings that set forth a cause of action or counterclaim must contain "(1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of **the facts** showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for **the relief to which he deems himself entitled.**" Rule 8(a), SCRCP (emphasis added). Therefore, Dailey was required to give Tirone notice of "the facts" showing he is entitled to relief and notice of "the relief to which he deems himself entitled." Watts v. Metro Security Agency, 346 S.C. 235, 550 S.E.2d 869 (Ct. App. 2001).

Further, the claims made in the pleadings establish the issues for litigation. For example, the scope of discovery is limited to subject matter relevant to the subject matter of the pending action. Rule 26(b), SCRCP. Moreover, it is "well settled" that parties are judicially bound by their pleadings. Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App.1992). Finally, a party "who has pled one theory should not be allowed to recover upon another." Blackburn and Co., Inc. v. Dudley, 289 S.C. 415, 417, 338 S.E.2d 151, 154 (1985).

Seeking to pierce the corporate veil is not a cause of action in and of itself but is a theory of liability. Drury Dev. Corp. v. Foundation Ins. Co., 380 S.C. 97, 102, 668 S.E.2d 798, 801 (2008). However, the party seeking to pierce the corporate veil must still provide notice of its theory of liability to the opposing party in the pleadings. Id. at 102, 668 S.E.2d at 802; Rule 8(a), SCRCP. "[S]o long as the plaintiff has pled facts sufficient to survive a motion to dismiss as to the corporate liability claims and the alter ego claim,

the trial court should move forward to determination of both matters." Id. at 102, 668 S.E.2d at 802.

A review of Dailey's Second Amended Answer and Counterclaim establishes that there are no allegations that would put Tirone and Respondent Truman's Eclectic Irish Pub, Inc. on notice that Dailey was seeking to pierce the corporate veil. There are no allegations that the corporation was grossly undercapitalized. There are no allegations that there was a failure to observe corporate formalities. There are no allegations relating to non-payment of dividends. There are no allegations that Tirone siphoned off funds. There are no allegations of non-functioning officers. There are no allegations relating to the lack of corporate records. There are no allegations that Respondent Truman's Eclectic Irish Pub, Inc. was a façade for Tirone. There are no allegations that injustice or fundamental unfairness will result if the corporate veil is not pierced. The prayer for relief does not request that the corporate veil be pierced, or that Tirone be held individually responsible for the debts of the corporations. See generally Multimedia Publ'g of S.C., Inc., v. Mullins, 314 S.C. 551, 431 S.E.2d 569 (1993) (requiring that there be injustice or fundamental unfairness if the corporate veil is not pierced and listing factors to be considered when seeking to pierce the corporate veil); Dumas v. InfoSafe Corp., 320 S.C. 188; 463 S.C.2d 641 (Ct. App. 1995) (listing factors to be considered when seeking to pierce the corporate veil); Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984) (same). (R. pp. 203-213).

Fundamental unfairness is typically shown when a shareholder financially benefits from the corporate form by receiving a corporation's profits or other money through a proper or improper shareholder distribution, while the creditor is left to enforce

his claim against an insolvent corporation. See, e.g, Sturkie, 280 S.C. at 453, 313 S.E.2d at 316. Here, Tirone has not received any financial benefit from the corporation whatsoever because the Pub never opened and never produced any revenue. (R. pp. 69-81; p. 219; p. 357, lines 10-11; p. 434, ¶ 33). To the contrary, she has lost over One Hundred Thousand ($100,000.00) Dollars, and counting. On the other hand, Dailey has not lost financially in the corporation, and in fact has had his child support obligations paid for with the corporation's money. Dailey cannot claim that the loss of his sweat equity constitutes a financial loss because he was on unemployment during the entire time his sweat equity was allegedly provided. (R. 344, lines 20-25; p.372 lines 12-17; p. 426, ¶ 14). Moreover, Dailey is the reason that the corporation is insolvent. Aside from the fact that he was responsible for the management of the corporation, he misappropriated the corporation's funds. (R. pp. 22-25; pp. 26-40; pp. 41-191; p. 375, line 13-p. 376, line 2; p. 376, line 12-p. 377, line 6; p. 399, line 4-p. 400, line 15; p. 402, lines 4-6; p.419, line 15-p.420, line 10;). This is simply not the type of case where Dailey could possibly show that recognizing the corporate form would result in injustice or fundamental unfairness to Dailey.

Finally, it would be legally impermissible to disregard the corporate veil here because the corporate form may only be disregarded to assist a third party. Woodside v. Woodside, 290 S.C. 366, 370, 350 S.E.2d 407, 410 (Ct.App.1986) ("The corporate form may be disregarded only where equity requires the action to assist a third party.") (emphasis added); Sturkie, 280 S.C. at 458, 313 S.E.2d at 319 ("The corporate form may be disregarded only where equity requires the action to assist a third party.") (emphasis added). Here, Dailey alleges that he and Tirone were "partners in a joint venture" and

were "equal partners." (R. p. 218; pp. 221-222). Dailey also testified in his deposition that "in my eyes I was a partner." (R. p. 365, lines 9-12). Therefore, a veil piercing claim would have failed as a matter of law, had it been properly asserted.

Since Dailey's Second Amended Complaint and Counterclaims did not contain any allegations to put Respondents on notice that Dailey would raise the theory of piercing the corporate veil, since Dailey cannot show fundamental unfairness, and since Dailey is by his own allegations is not a third-party to the corporation, the Circuit Court properly granted Tirone summary judgment in her individual capacity.

B. *Individual liability of Tirone under employment contracts.*

Dailey asserts in the title of Argument I that "the record contains substantial evidence that Helena Tirone is a proper defendant, both individually and after piercing the corporate veil," suggesting that the Circuit Court improperly granted Tirone summary judgment as to her individual liability under two Key Employee Employment Contracts. However, Dailey fails to provide any argument to support the assertion. Therefore, Dailey has waived any argument related to Tirone's individual liability under the employment contracts. See Rule 208(b)(1)(D), SCACR (requiring argument of each issue in an appellant's brief to include discussion of the issue as well as citations to authority); Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54 n.4,677 S.E.2d 32,36 n.4 (Ct. App. 2009) (deeming an issue waived on appeal if it is not argued in the appellant's brief). Nevertheless, even if Dailey has not waived such an argument, the argument has no merit.

A review of the Key Employee Employment Contracts establishes that the contracts were entered into between "Truman's Eclectic Irish Pub, Inc.," and "Thomas

W. Dailey." (R. pp. 83-88; pp. 254-257). The contracts specify that Respondent, Truman's Eclectic Irish Pub, Inc., is the Employer. (R. pp. 83-88; pp. 254-257). Tirone signed the contracts as the "Owner, President & CEO, Truman's Eclectic Irish Pub, Inc." (R. pp. 83-88; pp. 254-257). Further, Dailey conceded and confirmed that the Key Employee Employment Agreements were between him and Respondent Truman's Eclectic Irish Pub, Inc.: "Q: Would you agree with me, Mr. Dailey, that both of these agreements as stated in paragraph 1 of both agreements are between Truman's Eclectic Irish Pub, Inc., employer, and Thomas W. Dailey, employee? A: Yes." (R. p. 366, lines 15-20).

A review of the Key Employee Employment Contracts and the testimony of Dailey establishes that the contracts were between Dailey and Respondent Truman's Eclectic Irish Pub, Inc., only. Accordingly, the Circuit Court did not err in granting summary judgment to Tirone.[3]

## II. The Circuit Court properly denied Dailey's Rule 60(b) Motion since there is no newly discovered evidence.

The decision to grant or deny a motion made under Rule 60, SCRCP, lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Accordingly, an appellate court's standard of review is limited to determining whether the trial court abused its discretion. An abuse of discretion occurs only where the trial court's order is controlled by an error of law or where the order is

[3] While the Key Employee Employment Contracts unambiguously establish that the parties to the contracts are Dailey and Respondent Truman's Eclectic Irish Pub, Inc., if there is any ambiguity, it must be construed against Dailey. Dailey testified in his deposition that he downloaded and modified the Key Employee Employment Contracts. The modifications included inserting information into the contract form. Dailey stated that no other person made any changes to the Key Employee Employment Contracts. (R. p. 358, line 17-p. 359, line 25). Accordingly, any ambiguities would be construed against Dailey, the drafter of the contracts. See, e.g., Duncan v. Little, 384 S.C. 420, 682 S.E.2d 788 (2009) (holding that ambiguities in a contract are construed against the drafting party); Williams v. Teran, Inc., 266 S.C. 55, 221 S.E.2d 526 (1976) (same).

based on factual conclusions that are without any evidentiary support. See McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 563 (Ct. App. 2008).

To obtain relief from a judgment based on newly discovered evidence, the moving party must establish that the newly discovered evidence: "(1) is of such magnitude that had the court known of it earlier, the outcome would likely have been different; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; **and** (5) is not merely cumulative or impeaching." Spreeuw v. Barker, 385 S.C. 45, 62-63, 682 S.E.2d 843, 852 (Ct. App. 2009) (emphasis added). Dailey failed to show that he could meet any element, much less all of the elements.

*A. The purported newly discovered evidence was not of the magnitude to change the outcome*

First, Dailey failed to show that Tirone's deposition transcript was "of such magnitude that had the court known of it earlier, the outcome would likely have been different." Spreeuw, 385 S.C. at 62-63, 682 S.E.2d at 852. Dailey's deposition testimony conclusively shows that he has no evidence to support a veil piercing claim. For example, with respect the capitalization of the corporation, Dailey testified that "Tirone contributed a sufficient amount of money to conduct the business of [the corporation]." (R. p. 350, lines 22-25). While Dailey argues on appeal that the corporation did not have functioning officers and directors, he testified under oath that the corporation had "functioning officers and directors" (R. p. 355, lines 4-6). While Dailey argues on appeal that there were no corporate records and that the corporation never had meetings, Dailey testified during his deposition that there were "corporate records," that he attended "the Corporation's first Board Meeting," and "minutes were



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taken of meetings." (R. p. 355, lines 7-10; pp. 429, ¶ 20). Dailey agreed during his deposition that he believed all of the corporate formalities as far as "having meetings, having a separate checking account, going to talk with an accountant, all of the things that needed to be done to have a real functioning corporation were done" or were on their way to being done. (R. p. 352, lines 18-24; p.353, line 22-p. 354, line 6). Dailey testified that he did not have any evidence that Tirone misappropriated money from the corporation. (R. p. 355, lines 16-19). Dailey testified that he did not have any evidence that Tirone inappropriately "siphoned away, embezzled, or mismanaged money of the corporation for her own personal interest." (R. p. 356, lines 6-10). Dailey agreed that he was not taking the position in the litigation that "this corporation was merely a façade for Helena Tirone" and agreed that it was "an actual functioning corporation." (R. p. 356, lines 11-15). "It is a general rule that a party is concluded by his own testimony which is favorable to the adverse party." Lytle v. Reagan, 256 S.C. 269, 273, 182 S.E.2d 302, 304 (1971). Therefore, nothing in Tirone's deposition would have changed the ultimate outcome.

*B. The purported newly discovered evidence was not "discovered" since the hearing*

The deposition testimony of a party opponent is not the type of evidence that can serve as "newly discovered evidence" under Rule 60(b). Dailey knew or should have known that he could depose Tirone and use her deposition to properly prosecute his counterclaims. It simply does not pass muster to argue that Tirone's deposition transcript was "newly discovered evidence."

*C. The purported newly discovered evidence could have been discovered before the hearing*

Even if the deposition transcript of a party can be considered "newly discovered" evidence as contemplated by Rule 60(b), the deposition transcript for Tirone could have been discovered before the summary judgment hearing and was in fact known before the summary judgment hearing. Newly discovered evidence is evidence "which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Southeastern Housing Foundation v. Smith, 380 S.C. 621, 636-37,670 S.E.2d 680, 688 (Ct. App. 2008). Pursuant to Rule 30(a)(1), SCRCP, Dailey had the ability to notice the deposition of Tirone after the instant lawsuit was filed on May 20, 2011, more than a year prior to Tirone moving for summary judgment.

*D. Material to the issue*

The deposition transcript of Tirone is not material to the issues as it does not support a veil piercing argument and is otherwise cumulative as set forth below.

*E. The purported newly discovered evidence is merely cumulative*

The excerpts of the deposition of Tirone contained in Dailey's Motion to Reconsider are cumulative to the other evidence in the case. Dailey cites Tirone's deposition to establish the amount of money she paid into the Respondent Truman's Eclectic Irish Pub, Inc. (R. p. 327). However, the corporation's bank records were provided to Dailey on or about October 14, 2011, in response to Dailey's First Request for Production 13. (R. p. 292). Further, the answer to Dailey's Interrogatory 11, provided to Dailey on or about October 14, 2011, lists the money paid by Respondent Helena Tirone. (R. p. 310).

Dailey also cites Tirone's deposition to support contentions that there were no financial statements prepared, no cash flow model, no officers elected, no bylaws, and no corporate records. (R. pp. 328-330). However, the information regarding financial statements and cash flow model was provided to Dailey by Respondents' response to Dailey's First Request for Production 13 (banking statement provided) and by Respondents' response to Dailey's Interrogatory 1 (listing Martin Craft and Jatin Patel as witnesses with information about financial information) and Interrogatory 11 (stating money deposits made by Respondent Helena Tirone into Respondent Truman's Eclectic Irish Pub, Inc.). (R. pp. 287-293; pp. 297-311). Highlighted bank statements were also provided to Dailey on May 7, 2012. (R. pp. 221-222; 276-277). In their Answer to Dailey's Interrogatory 9, Respondents stated that Tirone was the only officer. (R. p. 310). In response to Dailey's First Request for Production 6, Respondents stated that there were no bylaws. (R. p. 291). As to corporate records, Respondents provided the records in their possession in response to Dailey's First Request for Production 4 and 8 and confirmed that there were no minutes or resolutions in response to Dailey's First Request for Production 7 and Dailey's Second Request for Production 5 and 6. (R. pp. 280-286; pp. 287-293). These responses were provided to Dailey on or about October 14, 2011. (R. pp. 280-286; pp. 287-293).

In his Motion to Reconsider, Dailey cites Tirone's deposition testimony to support contentions that she was the sole owner of Respondent Truman's Eclectic Irish Pub, Inc., and that she improperly disposed of the assets of Respondent Truman's Eclectic Irish Pub, Inc. (R. pp. 330-332). These citations do not establish that Tirone improperly disposed of any assets and, nevertheless, are again cumulative to the other evidence in the

case. For example, regarding Tirone as the sole owner of the corporation, Respondents stated that Tirone was the sole shareholder of Respondent Truman's Eclectic Irish Pub, Inc. in response to Dailey's Interrogatory 8. (R. pp. 309-310). As to the removal assets of Respondent Truman's Eclectic Irish Pub, Inc., Respondents stated in response to Dailey's Second Set of Interrogatory 2 that "everything was removed from [the pub] to various locations including [Tirone's home] and a storage unit." (R. p. 447). Regarding the corporation having no assets, Respondents provided this information in response to Dailey's Second Request for Production 3 and provided banking records in response to Dailey's First Request for Production 13. (R. pp. 280-286; pp. 287-293). Moreover, the very arguments advanced by Dailey in Section III of his Brief establishes that the deposition of Tirone was cumulative and thus could not be considered newly discovered evidence. App. Brief pp.23-24.[4]

Dailey complains that the Circuit Court did not address the issues raised in his Rule 60, SCRCP, Motion relating to whether supplemental proceedings could be taken against one of the Respondents. However, Dailey failed to make a motion pursuant to Rule 59(e), SCRCP, to obtain a ruling on the issue either after the Circuit Court filed its Order dated August 10, 2012, or after the Form 4 Order disposing of the Rule 60, SCRCP Motion. Dailey could and should have timely made such motions **irrespective of any argument related to newly discovered evidence**. Accordingly, this issue is not

[4] The trial court's summary judgment order did not turn on Dailey's failure to produce evidence that has now been discovered. The trial court found that "Dailey has filed three (3) separate counterclaim pleadings over the course of twelve (12) months: June 3, 2011; December 5, 2011 and June 21, 2012. Dailey has never alleged any facts to support a veil piercing theory or even requested that the corporate veil be pierced. Based on the above, Plaintiffs' Motion for Summary Judgment as to the individual liability of Tirone is hereby granted." (R. p. 13). There was ample support for the trial court order. As discussed in detail in Section I above, Dailey did not plead any facts or request relief that would have put Tirone on notice that Dailey was seeking to pierce the corporate veil, or that he was requesting that the court hold Tirone individually liable for the debts of the corporation.

preserved for review. Lucas v. Rawl Family Ltd.P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004) (holding that it is well settled that an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court); Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007) (stating that to be preserved for review, issues must be raised to and ruled upon by the trial court).

Dailey's failure to file a timely Rule 59(e) motion to reconsider is amplified by the arguments made in his brief. For example, Dailey contends that the Circuit Court "possibly ruled" on a point of law in an "off-the-record" proceeding. (App. Brief p.20). Dailey further argues that the Circuit Court's "off-the-record assessment" was not "clarified in the subsequent written order." Id. Thus, Dailey argues that it is reversible error for a final written order to conflict with a possible ruling made in an off-the-record proceeding. Respondents would respectfully submit that this is a text book example of a situation where Dailey should have filed a Rule 59(e), SCRCP, Motion after the Order dated August 12, 2011, and after the Form 4 Order, so that the issues now placed before this Court could have been raised to and ruled upon by the trial court.[5]

Nevertheless, even assuming that there were a conflict between what the trial judge said on or off the record and the written order, "[t]he judge's final written order represents the decision of the court." Corbin v. Kohler Company, 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct. App. 2002). Indeed, "[n]o order is final until it is written and entered." First Union Nat'l Bank v. Hitman, Inc.,306 S.C. 327, 329, 411 S.E.2d 681, 682

[5] Moreover, Respondents do not concede that the trial court's statements occurred off the record, as the undersigned's recollection of the motion hearing was that the trial court re-visited the motion for summary judgment later during the July 30, 2012 motions hearing while the parties and the court were still on the record. However, Dailey failed to comply with Rule 207, SCACR, when he ordered only the first ten (10) pages of the motion hearing transcript. Rule 207, SCACR provides that "[u]nless the parties otherwise agree in writing, appellant must order a transcript of the entire proceedings below." Rule 207(a)(1), SCACR (emphasis added). Therefore, the litigants and this Court can only speculate about what may or may not have occurred on the record later during the hearing, as well as off the record.

(Ct.App.1991), *aff'd*,308 S.C. 421, 418 S.E.2d 545 (1992). Thus, "[u]ntil written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly." Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001).

To the extent that the Circuit Court determined that Dailey was barred from pursuing a post judgment or supplemental action against Tirone seeking to pierce the corporate veil, the Circuit Court was correct under the facts of this case.

As discussed in Section I, Dailey would not ever be able to pierce the corporate veil as a matter of law. First, Dailey cannot show any fundamental unfairness resulting to him if not allowed to pierce the corporate veil. The only person who has lost money in the corporation is Tirone. See, e.g. Multimedia Publ'g, 314 S.C. at 551, 431 S.E.2d at 569. Even more importantly, Dailey testified that he was a partner of the Respondent Truman's Eclectic Irish Pub, Inc. (R. pp. 221-222; p. 360, line 24-p. 361, line 2; p. 363, lines 7-15; p. 423 ¶ 8). Since he is not a third party to the corporation, he could never be able to pierce the corporate veil. See, e.g., Woodside, 290 S.C. at 370, 350 S.E.2d at 410. Accordingly, a veil piercing claim would have failed as a matter of law, had it been properly asserted in the instant case, and will fail as a matter of law if asserted in a post judgment proceeding. As noted in Drury Development, equity will not require the doing of a futile task or the filing of a pro forma pleading. Id. at 102, 668 S.E.2d at 801. See also Radaszewski v. Telecom Corp., 981 F.2d 305 (8th Cir.1992) cert. denied, 508 U.S. 908, 113 S.Ct. 2338, 124 L.Ed.2d 248 (1993) (holding that since Radaszewski failed to establish an element necessary to pierce the corporate veil in the first action, he would not be allowed to file a futile post judgment action).

For all of these reasons, the trial court did not error in denying Dailey's Rule 60(b) Motion.

**III. The Circuit Court properly granted summary judgment in favor of Tirone individually because with or without considering the deposition transcript of Tirone, there was not a scintilla of evidence of Tirone's individual liability.**

Dailey next argues that, even disregarding the deposition of Tirone, summary judgment was improper because there is a scintilla of evidence to establish her liability by piercing the corporate veil. In support of this argument, Dailey again addresses only the piercing the corporate veil factors. However, as discussed in detail above in Section I, Dailey failed to put Respondents on notice, through his Second Amended Answer and Counterclaims, that he was going to make a veil piercing argument. See Rule 8(a), SCRCP. Accordingly, the Circuit Court held that Dailey did not plead any facts to support a veil piercing theory and correctly granted summary judgment to Tirone.

**IV. The Circuit Court did not commit reversible error in refusing to grant Dailey's request to postpone the hearing, which was made on the date of hearing.**

The Circuit Court properly denied Dailey's request to postpone the hearing on the pending Summary Judgment motion.

In the Memorandum of Law, which was filed on the same day as the hearing, and at the hearing, Dailey asked for a continuance so that the transcript of Tirone's deposition could be presented. (R. p. 231; p. 341 (p. 9), lines 19-p.342 (p. 10), line 3). The Circuit Court heard the Summary Judgment Motion.

"Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth." State v. McKennedy, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002). Indeed, it is a long-standing tenant of South Carolina law that motions for a continuance are left to

the discretion of the judge and will not be overturned unless there is a clear case of abuse of discretion. Hill v. Hill, 51 S.C. 134, 28 S.E. 309 (1897); McKennedy, 348 S.C. at 270, 559 S.E.2d at 850.

Moreover, Rule 56(f), SCRCP, provides a procedure for litigants to delay a hearing on a motion for summary judgment by submitting an "affidavit" to the court that includes the "reasons" why he cannot "present . . . facts essential to justify his opposition." Rule 56(f) further provides that if such a showing is made, the trial court "may refuse to grant summary judgment or continue the motion." Rule 56(f), SCRCP. Here, Dailey did not present any such affidavit to the Circuit Court as required by Rule 56(f). Further, Dailey's reliance on Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991), is misplaced. In footnote 4, the Court in Baughman noted that Plaintiffs did not file an affidavit to invoke Rule 56(f) but that other courts had not mandated strict compliance with the Rule. Id. In finding that the grant of summary judgment was premature and that the Plaintiffs should have had more time for discovery, despite the lack of an affidavit as required by Rule 56(f), the Court found that (1) plaintiffs had established the likelihood that further discovery would uncover additional relevant evidence; (2) plaintiffs had not been dilatory in conducting discovery on causation and seeking an expert; (3) the defendant had engaged in dilatory discovery conduct which caused "critical information" to be withheld from plaintiff; and (4) the complexity of the case (i.e. 187 named plaintiffs) and the hardship of proving causation. Id. at 113-14, 410 S.E.2d at 544-45. These mitigating factors are simply not present here. Dailey relies on Tirone's deposition to support a theory of liability he chose to improperly raise on the day of the summary judgment hearing that was not contained in

his Second Amended Answer and Counterclaim. Accordingly, the deposition excerpts simply are not relevant. Moreover, as discussed below, Dailey cites portions of Tirone's deposition that are cumulative to the other discovery in the case. In addition, Dailey had more than one year in which he could have but did not take Tirone's deposition. Dailey also failed to identify any improper discovery conduct on the part of Respondents. Finally, this case does not have similar complex causation issues or complexity caused by the number of parties to the litigation. Therefore, the Court was justified in failing to grant the improper request for a continuance.

Presumably, Dailey's request for a continuance, if properly made, would have been supported by his argument that discovery was incomplete since the transcript of Tirone's deposition was not available. However, as discussed in Section I, the trial court's order did not turn on a lack of evidence, but a defect in Dailey's pleadings. Further, as addressed in Section II, Tirone's deposition was cumulative to the other evidence in the case. Moreover, testimony from Tirone's deposition was actually included in Dailey's Memorandum of Law. (R. p. 230).

Accordingly, the Circuit Court did not abuse its discretion by refusing to grant an improper request for a continuance that was not supported by an affidavit as required by Rule 56(f), SCRCP. A continuance was also improper because it would have only allowed Dailey to enter cumulative evidence relating to a claim not raised by or included in the pleadings.

## V. Since Dailey never filed a proper Motion to Amend, the Circuit Court did not err in refusing to allow Dailey to amend his pleadings for a third time.

The Circuit Court did not err in refusing to allow Dailey to amend his Pleadings for a third time since Dailey did not file a proper Motion to Amend.

In his Memorandum of Law prepared for the July 30, 2012 hearing, Dailey states, in footnote 2, "[a] party does not need to plead veil piercing as a separate cause of action in South Carolina. To the extent these allegations are not properly encompassed in the Second Amended Counterclaims, Dailey moves to amend his Second Amended Counterclaims consistent with these allegations." (R. p. 229). The Memorandum of Law was filed minutes before the hearing on the Summary Judgment Motion. (R. p. 215; p. 339). During the hearing on the Summary Judgment motion, Dailey moved to amend his Second Amended Counterclaims. (R. p. 341 (p. 7), line 22-p.8, line 6). In footnote 1 to his Motion to Reconsider, Dailey states that "[t]o the extent a motion to amend the counterclaim is necessary, Defendant also makes such a motion." (R. p. 324).

Dailey's footnotes do not constitute a proper motion. Under Rule 7(b), SCRCP, a written motion must state with peculiarity the grounds of the motion, and set forth the relief or order sought. Rule (7)(b)(1), SCRCP. For a Motion to Amend, setting forth the relief sought almost always includes submitting the proposed amended pleading. Rule (7)(b)(1), SCRCP. Further, Rule 11, SCRCP, requires that every motion filed contain "an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held." Rule 11(a), SCRCP. In addition, a party filing a motion has to pay a $25.00 filing fee. S.C. Code Ann. § 8-21-320. The South Carolina Judicial Department also requires that a motion be accompanied by a Motion Cover Sheet (SCCA 233).

In the instant case, no written motion that stated the grounds of the motion and the relief sought was filed with the Circuit Court, and no proposed Third Amended Answer and Counterclaims has been served on Respondents. A footnote in a Memorandum of Law and in the Motion to Reconsider does not constitute the required Rule 11 certification. Further, no motion cover sheet or filing fee was filed by Dailey. Accordingly, no proper motion to amend was made.

Assuming *arguendo* that Dailey did make a proper motion to amend, then the Circuit Court properly denied it. "The decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal." Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct.App.1997). Moreover, the Circuit Court's findings will be overturned "without an abuse of discretion or unless manifest injustice has occurred." Id. See also Brown v. James, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010).

Leave to amend shall be given "when justice so requires and [it] does not prejudice the other party." Rule 15(a), SCRCP. In this case, Respondents would be prejudiced by allowing Dailey to amend his Answer and Counterclaim for a third time to add new issue (veil piercing) not contained in the prior pleadings. As Respondents informed the Circuit Court prior to the Rule 60(b) hearing, allowing amendment to include veil piercing would prejudice the Respondents because Respondents (1) did not conduct any discovery relating to veil piercing in over one year of discovery; (2) did not retain any experts relating to veil piercing; (3) did not raise any defenses to veil piercing; and (4) did not have the time to develop the veil piercing issues for trial. (R. pp. 452-454). Accordingly, there was no error in refusing to allow Dailey to amend his Answer

and Counterclaims for a third time, should this Court determine a proper Motion to Amend was actually made.[6]

## CONCLUSION

For the reasons contained herein and as may be raised in any Supplemental Briefs and at oral arguments, the Orders of the Circuit Court should be affirmed in their entireties.

Respectfully submitted,

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[6] Respondents were allowed to amend their Pleadings in the same hearing that resolved the motion for summary judgment. However, the trial court allowed the amendment because the "proposed amended pleading does not add any additional parties, does not add any additional causes of action, and does not add any additional theories of liability. In other words, the proposed amendment will not create any additional discovery or otherwise delay the trial of this case. Because the amendment will not prejudice Defendant in any way and will not delay the trial of this case, I find that the amended pleading is due to be and is hereby allowed pursuant to Rule 15(a), SCRCP and Foggie v. CSX Transportation, Inc., 313 S.C. 98, 431 S.E.2d 587 (1993)." (R. p. 17). Allowing Dailey to amend his Second Amended Answer and Counterclaims to add a new theory of liability on the day of the summary judgment hearing would have delayed the trial and materially prejudiced Respondents.

## CERTIFICATE OF COUNSEL

The undersigned, J. Ashley Twombley, certifies that this Final Brief of Respondents complies with Rule 211(b).

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THE STATE OF SOUTH CAROLINA
Beaufort County of Common Pleas

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge for Beaufort County

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

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

-vs.-

THOMAS W. DAILEY.....Respondent

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CERTIFICATE OF SERVICE

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The undersigned, Andrea Smith, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Respondents, and that on the July 3, 2013, a true and accurate copy of the attached of Respondents' Final Brief was placed in an envelope with first class postage thereon prepaid through the United States Postal Service and mailed to the following:

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**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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

v.

Thomas W. Dailey, Appellant.

Appellate Case No. 2012-213582

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Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

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Unpublished Opinion No. 2014-UP-203
Heard March 5, 2014 – Filed May 28, 2014

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**AFFIRMED**

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Andre DuBose Rembert, of Charleston, for Appellant.

James Ashley Twombley, of Twenge & Twombley, LLC, of Beaufort, for Respondents.

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**PER CURIAM:** Thomas W. Dailey appeals the order of the trial court granting summary judgment to Helena P. Tirone, in which the court held Tirone was not individually liable under Dailey's counterclaims. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: Rule 203(b)(1), SCACR (stating

the notice of appeal in a civil action must be served on all respondents within thirty days following receipt of written notice of entry of the order or judgment); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004) (stating the requirement of service of the notice of appeal is jurisdictional); *id.* at 14-15, 602 S.E.2d at 775 ("[I]f a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."); *Otten v. Otten*, 287 S.C. 166, 167, 337 S.E.2d 207, 208 (1985) (stating a motion made under Rule 60, SCRCP, does not toll the running of the time for appeal); *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance."); *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) (stating that in order to obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence: "(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching"); *McCall v. IKON*, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (stating an order comes to the appellate court with a presumption of correctness and the burden is on appellant to demonstrate reversible error); *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).[1]

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[1] This court denied Dailey's motion to accept the filing of his final reply brief out of time. Even if the court had accepted the reply brief, our decision would be the same. *See McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) (stating an issue may not be raised for the first time in a reply brief); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691-92 (Ct. App. 2001) (finding appellant's argument made in footnote of initial brief was not preserved because it was conclusory and cited no supporting authority and while the argument was more fully addressed in the reply brief, an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief).

**AFFIRMED.**

**HUFF, THOMAS, and PIEPER, JJ., concur.**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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.

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# PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, the Appellant submits the following in support of his petition for rehearing in this matter:

The Court's opinion has overlooked or misapprehended several issues to the prejudice of the Appellant. First and foremost, the Order Granting Summary Judgment was properly before this Court and should have been considered. Next, the Court has overlooked evidence pertinent to Appellant's Rule 60 motion. Finally, the Court appears to not have directly addressed several of Appellant's issues on appeal.

## I. The Order Granting Summary Judgment is properly before this Court and should be reversed.

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

This Court overlooks Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011).[1] In Thornton, the plaintiffs brought actions for negligence, strict liability, and nuisance. 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

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

action under the Mining Act. This 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.

This Court also overlooks 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).

Here, this Court is presented with the dismissal of an individual party (Respondent Tirone), the principal of a party corporation (Respondent Truman's). 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". Thornton. As in McLeod, the 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



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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 is properly before this Court, and should be reversed after a new hearing.

**II. The Court has overlooked the evidence supporting Appellant's Rule 60 Motion.**

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

(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[2] cannot be overemphasized: the South Carolina Supreme 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).

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

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.[3] 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 this Court is 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

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

[3] See also Appellant's Reply Brief, Argument I.

motion, using a standard very similar to that presented by the Respondents, our Supreme 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 Sturky test. Had this testimony been before a court, and had the court allowed all inferences for the non-moving party (here, the Appellant), it is abundantly clear that a scintilla of evidence existed in support of veil

piercing. Appellant respectfully avers that this Court has overlooked these facts and requests rehearing and reversal of the Trial Court.

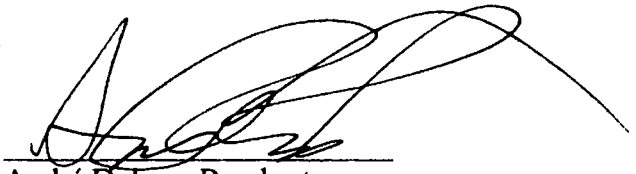
## III. The Opinion does not directly address the issue of a continuance for the Motion for Summary Judgment hearing or the amendment of his pleadings.

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 this Court, but the Court's order does not appear to address this issue (Section IV of Appellant's Brief). Appellant would respectfully aver that this has been overlooked, and would ask this Court to grant rehearing and reverse this order of the Trial Court.

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

## CONCLUSION

This Court has been presented with a variety of tools by which it may correct the unjust, "no-win" situation that the Appellant 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. Appellant would ask this Court to grant rehearing and issue an amended Opinion reversing the Trial Court.



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Attorney for Appellant

Charleston, South Carolina
12 June 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III
Master-in-Equity

---



Appellate Case No. 2012-213582

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

v.

Thomas W. Dailey.....Appellant.

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## PROOF OF SERVICE

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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:

**Pleadings:** PETITION FOR REHEARING

**Party Served:** J. Ashley Twombley
twombley@wtlawfirm.com
TWENGE + TWOMBLEY LAW FIRM
311 Carteret Street
Beaufort, SC 29902



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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

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Appellate Case No.: 2012-213582

---

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

-vs.-

THOMAS W. DAILEY.....Appellant

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# RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING

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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 28th.

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 Twombley by Ben D Rawl (with express permission)

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ATTORNEYS FOR RESPONDENTS

Beaufort, South Carolina

June 24, 2014



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THE STATE OF SOUTH CAROLINA
Beaufort County of Common Pleas



APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Appellate Case No.: 2012-213582

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

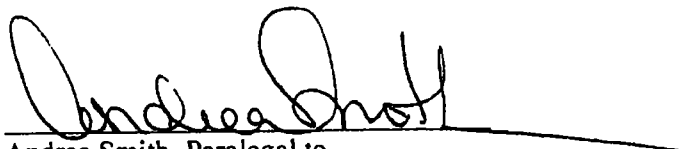
-vs.-

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
Charleston, SC 29403
Telephone: (843) 518-3232
andrerembert@gmail.com
Attorney for Appellant

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

**THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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**APPEAL FROM BEAUFORT COUNTY**
**Court of Common Pleas**

**Marvin H. Dukes, III**
**Master-in-Equity**

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**Appellate Case No. 2012-213582**

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

**v.**

**Thomas W. Dailey.....Appellant.**

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# REPLY TO RESPONDENTS' RETURN

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**André DuBose Rembert**
**17 Clemson Street**
**Charleston, SC 29403**
**andrerembert@gmail.com**
**843-518-3232**

**Attorney for Appellant**

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

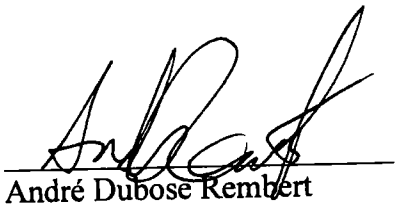
1. Appellant's Petition was timely filed per Rule 221(a), SCACR. The Court's order was issued on May 28, 2014, and Appellant's Petition was actually received by this Court on June 12, 2012 (file-stamped cover page attached as Exhibit A).
2. The Respondents misstate Appellant's argument in his January 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, SCRCP, 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), SCRCP. (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), SCRCP. (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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Charleston, South Carolina
27 June 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

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

v.

Thomas W. Dailey.....Appellant.

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PROOF OF SERVICE

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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 Twombley
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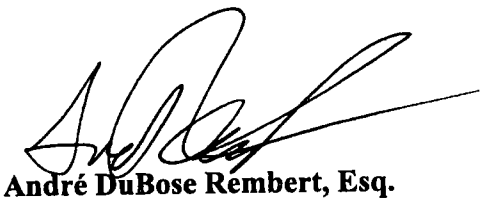

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**Attorneys for Appellant**

**Dated: June 27, 2014**

# The South Carolina Court of Appeals

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

v.

Thomas W. Dailey, Appellant.

Appellate Case No. 2012-213582

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ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Young J.

H. Bruce Williams J.

Paul D. Thomas J.

Columbia, South Carolina

cc:
Andre DuBose Rembert, Esquire
James Ashley Twombley, Esquire

FILED
September 4, 2014

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