

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case Nos. 2013-CP-40-6571 & 2014-CP-40-4165

RECEIVED

OCT 29 2014

SC Court of Appeals

MHOOD

Ashely S. Griffith..... Appellant,

v.

Pathology Service Associates, LLC n/k/a
PST Services, Inc..... Defendant,

with

Pathology Service Associates, LLC as the Respondent.


APPELLANT’S MOTION TO DISMISS APPEAL AS MOOT

Appellant respectfully files this motion to dismiss this appeal as moot per Rule 260(c), SCACR. Subsequent to the filing of this appeal, Appellant—Plaintiff below—served and filed a stipulation of dismissal per Rule 41(a)(1)(A), SCRCP dismissing Respondent from these cases. This dismissal terminates all further proceedings between Appellant and Respondent per Matter of Morrison, 321 S.C. 370, 468 S.E.2d 651 (1996). This has the effect of mooting this appeal, and Appellant accordingly moves to dismiss this appeal.

October 27, 2014

Other Counsel of Record:

BILL WOOD, TIM MCKISSOCK, JAMES BURNS,
ERIN STUCKEY & ELIZABETH SCOTT MOISE
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street, 17th Floor
Columbia, South Carolina 29201
Phone: 803.255.9534
Fax: 803.255.9073
Email: bill.wood@nelsonmullins.com
Attorneys for Respondent



J. TODD KINCANNON
THE KINCANNON FIRM
P.O. Box 7901
Columbia, South Carolina 29202
Phone: 877.992.6878
Fax: 888.704.2010
Email: Todd@TheKincannonFirm.com
Attorney for Appellant

APPELLANT'S MOTION TO DISMISS APPEAL AS MOOT

UNDISPUTED FACTS RELEVANT TO THIS MOTION

Appellant is the Plaintiff below. Respondent claims to be a defendant, yet Appellant claims that Respondent is not a defendant. This disagreement is the basis of this appeal. The notice of appeal was filed on October 14, 2014 arising out of the trial court permitting Respondent to present argument at a hearing on October 9, 2014 over Appellant's objection that Respondent is not a defendant and had no right to participate.

The day after filing the appeal, October 15, 2014, Appellant served and filed a stipulation of dismissal per Rule 41(a)(1)(A), SCRCP with the trial court and with this Court dismissing Respondent as a defendant from these cases to whatever extent Respondent ever was a defendant, which Appellant continues to deny. To permanently resolve the defendant identification issue, Appellant's October 15, 2014 stipulation of dismissal dismissed *every* entity from these cases except the single entity Appellant contends is the proper Defendant. That stipulation does not and cannot mandate that the other entity is the Defendant regardless of what a court says. That stipulation only mandates that every *other* entity—including Respondent—is *not* a defendant.

As of October 15, 2014, when Appellant's stipulation of dismissal was served and filed, Respondent had never served an answer or motion for summary judgment in either case. As of this writing, Respondent still has not served either of those things in either case. In Case No. 2014-CP-40-4165, Respondent had previously served a motion to set aside default that included a *proposed* answer with the motion, but Respondent has never served that document as an actual answer to the complaint.

DISPUTED FACTS RELEVANT TO THIS MOTION

Appellant believes there are no disputed facts relevant to this motion.

LAW

As to the Stipulation of Dismissal Issue

A tort plaintiff has an absolute right to **not** sue a potential defendant in a case. Chester v. Department of Public Safety, 388 S.C. 343, 698 S.E.2d 559 (2010). Rule 41(a)(1)(A), SCRPC permits the plaintiff to unilaterally stipulate to the dismissal of an action against a defendant if the defendant has never served an answer or motion for summary judgment. If a plaintiff exercises his or her right of dismissal under Rule 41(a)(1)(A), SCRPC, the controversy between the plaintiff and the dismissed defendant ends immediately. Matter of Morrison, 321 S.C. 370, 468 S.E.2d 651 (1996).

Once a stipulation of dismissal has been filed, “There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court.” Marex Titanic, Inc. v. Wrecked and Abandoned Vessel Believed to be the RMS Titanic, 2 F.3d 544, 546 n.2 (4th Cir. 1993) (cited in Matter of Morrison). “[O]ne doesn’t need a good reason, or even a sane or any reason, to dismiss . . . voluntarily. The right is absolute, as Rule 41(a)(1) and the cases interpreting it make clear[.]” Marques v. Federal Reserve Bank of Chicago, 286 F.2d 1014 (7th Cir 2002) (Posner, J.).

“If the plaintiff files a notice of dismissal before the adverse party serves it with an answer or a motion for summary judgment, the dismissal is available as a matter of unconditional right and is self-executing, i.e., it is effective at the moment the notice is

filed with the clerk and no judicial approval is required.” Marex Titanic at 546 (quotations omitted). A voluntary dismissal “carrie[s] down with it previous proceedings and orders in the action[.]” Id. (quotation omitted).

As to the Mootness Issue

“An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.” Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citing Jackson v. State, 331 S.C. 486, 489 S.E.2d 915 (1997)). “Mootness has been defined as follows: ‘A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for the reviewing Court to grant effectual relief.’” Byrd v. Irmo High School, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (quoting Mathis v. S.C. State Highway Dep’t, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

Cheap-O’s Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 602-03, 567 S.E.2d 514, 517 (Ct. App. 2002) (cert. granted, then dismissed as improvidently granted, 356 S.C. 616, 591 S.E.2d 26 (2003)).

“An appeal or other proceeding may be dismissed on motion of the appellant or petitioner upon such terms as may be fixed by the court.” Rule 260(c), SCACR. Except for very narrow exceptions not present in this case, when a case becomes moot on appeal, the appeal must be dismissed. Mathis v. S.C. State Highway Dep’t, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) (dismissing appeal of a driver’s license suspension as moot where the respondent obtained the return of his license during the pendency of the appeal). Even if an exception to mootness would otherwise apply, if mootness occurs due to a Rule 41(a)(1)(A) stipulation of dismissal, the courts lacks jurisdiction from that point forward. Matter of Morrison, *supra*; *see also* Alexander v. Alexander, 560 N.E.2d 1337 (Ohio Ct. App. 1989) (holding that a voluntary stipulation of dismissal filed during the pendency of appeal terminates the controversy and the appeal).

APPLICATION OF LAW TO THE UNDISPUTED FACTS

This appeal arises out of a disagreement between Appellant and Respondent as to whether Respondent is a defendant in these cases. Respondent claims to be a defendant, while Appellant claims that Respondent is not a defendant. Because Respondent has not served an answer or motion for summary judgment in either case, Appellant has the right to immediately and unilaterally deprive Respondent of defendant status by stipulation of dismissal per Rule 41(a)(1)(A). Appellant exercised that right by serving and filing a stipulation of dismissal as to Respondent on October 15, 2014.

This moots the appeal. The question of whether Respondent is a defendant has been answered by Appellant's stipulation of dismissal. If Respondent *was* a defendant, Respondent is no longer a defendant. If Respondent *was not* a defendant, then Appellant's stipulation of dismissal certainly did not change that status.

Whatever Respondent's status prior to Appellant's October 15, 2014 stipulation of dismissal, Respondent is unquestionably not a defendant in light of that stipulation. Appellant filed this appeal asking the Court to decide that Respondent is not a defendant and cannot participate in these cases. The Court need not decide that issue now that it has been resolved for all time by Appellant's stipulation.

With *very* few exceptions (such as subject matter jurisdiction), an agreement between the parties stipulating to resolve a dispute on appeal will moot the appeal. The quirk here is that Rule 41(a)(1)(A) permits a plaintiff to unilaterally moot an adversary's claim to defendant status prior to the adversary filing an answer or motion for summary judgment. Most stipulations are bilateral, but a proper unilateral stipulation can have the same effect when it resolves a dispute that is the subject of a pending appeal.

Because Appellant immediately appealed the trial court's decision to allow Respondent to participate in the case as a defendant as required by Neeltec Enterprises, Inc. v. Long, the trial court has taken no action whatsoever in the case other than to hold a hearing in which Respondent was allowed to participate. There are no orders to vacate or decisions to reverse in the court below. All Appellant requests is that this appeal be dismissed as moot on the grounds that Respondent is not a defendant in light of Appellant's October 15, 2014 stipulation of dismissal. That wholly resolves the issue because an order dismissing the appeal as moot because Respondent is not a defendant will prohibit Respondent from further participation in the case here and below, and correctly so per Matter of Morrison and Chester v. Department of Public Safety.

Appellant's timely and immediate filing of a notice of appeal means Appellant does not need the Court to "undo" any of Respondent's prior participation. None of Respondent's unwelcome participation resulted in any rulings from the trial court other than the mere permission to participate in one hearing as a defendant, a hearing at which the trial court did nothing other than take the matters presented under advisement.

Whether Respondent was a defendant in these cases or not prior to Appellant's stipulation of dismissal is not a question that needs to be decided by this Court because the trial court has never issued any rulings dependent on that issue. This situation is a near textbook example of mootness. Whatever Respondent's status prior to the stipulation of dismissal, Respondent is definitely not a defendant as a result of the stipulation. This by itself resolves the matter for the future. And because Respondent's brief participation in the case as a defendant—whether legally correct or not—did not lead to any decisions by the trial court, there is nothing already done that needs to be reviewed by this Court.

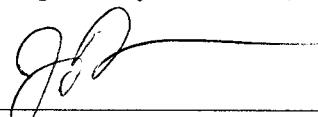
Given the procedural posture of this case, dismissal of this appeal for mootness is mandatory. Even if it were not, Matter of Morrison requires dismissal in any event because a stipulation of dismissal per Rule 41(a)(1)(A) terminates all controversies between Appellant and Respondent. Finally, Appellant is a tort plaintiff who does not want to sue Respondent and has the absolute right to make that decision at this juncture.

CONCLUSION

This case demonstrates the wisdom of the Supreme Court's decision in Neeltec requiring a plaintiff to immediately appeal disputes over the identity of a defendant. The work of the appellate court is substantially lessened when this issue comes up on what would otherwise be an interlocutory appeal. And in this case, the appellate court need not do any work at all to decide substantive issues because Appellant has resolved them all by stipulating to the dismissal of Respondent per Rule 41(a)(1)(A), SCRCF. This shortcut is not available in all cases, but it is available in this case as of right to Appellant.

Based on the foregoing, Appellant respectfully requests the Court of Appeals dismiss Appellant's appeal as moot per Rule 261(c), SCACR in light of Appellant's October 15, 2014 stipulation of dismissal as of right per Rule 41(a)(1)(A), SCRCF that has deprived Respondent of defendant status in this litigation.

Respectfully submitted,



J. TODD KINCANNON
THE KINCANNON FIRM
P.O. Box 7901
Columbia, South Carolina 29202
Phone: 877.992.6878
Fax: 888.704.2010
Email: Todd@TheKincannonFirm.com
Attorney for Appellant

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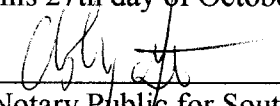
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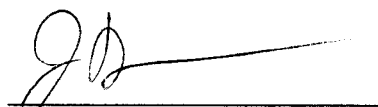
**AFFIDAVIT VERIFYING APPELLANT'S
MOTION TO DISMISS APPEAL AS MOOT**

The undersigned counsel for Appellant, first being duly sworn, hereby verifies all facts in the foregoing Appellant's Motion to Dismiss Appeal as Moot. Appellant is aware of such facts of his own personal knowledge. Appellant's counsel further avers that he believes that none of the foregoing facts are controverted or controvertible in good faith.

Sworn to and subscribed before me
this 27th day of October, 2014



Notary Public for South Carolina
My commission expires 4-24-23



J. TODD KINCANNON

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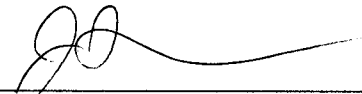
Pathology Service Associates, LLC as the Respondent.

CERTIFICATE OF SERVICE

I, the undersigned employee of The Kincannon Firm, certify that I have on the date below indicated served Respondent in this matter with the foregoing Appellant’s Motion to Dismiss Appeal as Moot together with this Certificate of Service by first class mail by and through Respondent’s counsel of record with a courtesy copy by email as follows:

BILL WOOD, TIM MCKISSOCK, JAMES BURNS,
ERIN STUCKEY & ELIZABETH SCOTT MOISE
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street, 17th Floor
Columbia, South Carolina 29201
Email: bill.wood@nelsonmullins.com

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J. TODD KINCANNON



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1015 Sumter Street
Columbia, SC 29201

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