

RECEIVED

NOV 04 2014

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Unpublished Opinion No. 2014-UP-203 (S.C. Ct. App. Filed May 28, 2014)
Appellate Case No.: 2014-002095

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

-vs.-

THOMAS W. DAILEYPetitioner

**RESPONDENTS' RETURN TO PETITIONER'S
PEITION FOR WRIT OF CERTIORARI**

J. Ashley Twombly
TWENGE + TWOMBLEY LAW FIRM
311 Carteret Street
Beaufort, SC 29902
Telephone: (843) 982-0100
Facsimile: (843) 982-0103
www.twlawfirm.com
ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

Table of Authorities	ii
Questions Presented	1
Statement of the Case	1
Argument	2
I. The Court of Appeals correctly determined that the Circuit Court’s Order filed August 10, 2012, was immediately appealable and that Petitioner failed to timely file a Notice of Appeal	2
II. Assuming arguendo that the Circuit Court’s Order filed on August 10, 2012, was not immediately appealable, Petitioner was still required to file a Rule 59(e), SCRCP, to preserve issues for appellate review	5
III. Even if Petitioner had timely filed a Motion to Reconsider and timely filed a Notice of Appeal and preserved all issues for review, the Circuit Court properly granted summary judgment to Tirone	6
IV. The Court of Appeals correctly affirmed the Circuit Court’s Order denying Petitioner’s Rule 60(b) Motion because there is no newly-discovered evidence	10
V. The Court of Appeals did not commit reversible error when it did not rule upon Petitioner’s arguments that were not properly presented to the trial court and not properly preserved for review.....	13
Conclusion	16
Certificate of Counsel	N/A

TABLE OF AUTHORITIES

Cases

Berry v. McLeod,
328 S.C. 435, 492 S.E.2d 794 (Ct.App.1997) 16

Blackburn and Co., Inc. v. Dudley,
289 S.C. 415, 338 S.E.2d 151 (1985) 7

Brown v. James,
389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010) 16

Drury Dev. Corp. v. Foundation Ins. Co.,
380 S.C. 97, 668 S.E.2d 798 (2008) 7

Dumas v. InfoSafe Corp.,
320 S.C. 188, 463 S.C.2d 641 (Ct. App. 1995) 8

Elam v. South Carolina Department of Transportation,
361 S.C. 9, 602 S.E.2d 772 (2004) 2

Foggie v. CSX Transportation, Inc.,
313 S.C. 98, 431 S.E.2d 587 (1993) 16

Guinan v. Tenet Healthsystems of Hilton Head, Inc.,
383 S.C. 48, 677 S.E.2d 32 (Ct. App. 2009) 6

Hardaway Concrete Co., Inc. v. Hall Contracting Corp.,
374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007) 5

Hill v. Hill,
51 S.C. 134, 28 S.E. 309 (1897) 15

Hill v. South Carolina Dep’t of Health and Environmental Control,
389 S.C. 1, 698 S.E.2d 612 (2010) 2

Lanier v. Lanier,
364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005) 11

Lucas v. Rawl Family Ltd.P’ship,
359 S.C. 505, 598 S.E.2d 712 (2004) 5

Lucas v. Rawl Family Ltd.P’ship,
2007-MO-058 (S.C. 2007)..... 3

<u>Lytle v. Reagan,</u> 256 S.C. 269, 273, 182 S.E.2d 302, 304 (1971)	9
<u>McClurg v. Deaton,</u> 380 S.C. 563, 671 S.E.2d 563 (Ct. App. 2008)	10
<u>Multimedia Publ'g of S.C., Inc., v. Mullins,</u> 314 S.C. 551, 431 S.E.2d 569 (1993)	8
<u>Murphy v. Owens-Corning Fiberglass Corp,</u> 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2002)	4
<u>Nauful v. Milligan,</u> 258 S.C. 139, 187 S.E.2d 511 (1972)	3
<u>State v. McKennedy,</u> 348 S.C. 270, 559 S.E.2d 850 (2002)	15
<u>State ex. Rel. McLeod v. C&L Corp., Inc.,</u> 280 S.C. 519, 313 S.E.2d 344 (Ct. App. 1984)	4
<u>Sturkie v. Sifly,</u> 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984)	8, 10
<u>Thornton v. S.C. Elec. & Gas Corp.,</u> 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011)	3, 4
<u>Watts v. Metro Security Agency,</u> 346 S.C. 235, 550 S.E.2d 869 (Ct. App. 2001)	7
<u>Woodside v. Woodside,</u> 290 S.C. 366, 350 S.E.2d 407 (Ct.App.1986)	10

Statutes

S.C. Code § 8-21-320	14
S.C. Code § 14-3-330	3

Other Authorities

Rule 7, SCRCP 13, 14

Rule 8, SCRCP 7

Rule 11, SCRCP 14

Rule 15, SCRCP 16

Rule 30, SCRCP 12

Rule 56, SCRCP 15

Rule 59, SCRCP 14

Rule 60, SCRCP 5, 10, 11

Rule 203, SCACR 2

Rule 208, SCACR 6

Rule 242, SCACR 2, 6

QUESTIONS PRESENTED

- I. Did the Court of Appeals err when it determined that the order granting summary judgment to Helena Tirone and dismissing her from the case was immediately appealable and that Petitioner failed to file a notice of appeal?
- II. Did the Court of Appeals overlooking evidence supporting Appellant's Rule 60 Motion?
- III. Did the Court of Appeals err by not expressly addressing the issue of a continuance or the amendment of his pleading?

STATEMENT OF THE CASE

Respondents, Truman's Eclectic Irish Pub, Inc. and Helena P. Tirone (Tirone), filed a Summons and Complaint against Petitioner, 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), SCRPC. (R. pp. 324-338). The Motion was denied by the Circuit Court on December 7, 2012. (R. pp. 18-19). Dailey filed a Notice of Appeal on December 7, 2012.

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).

The Court of Appeals, in an unanimous decision, affirmed the Circuit Court's Order by its Opinion filed on May 28, 2014. Dailey filed a Petition for Rehearing that was denied on September 4, 2014. Dailey then filed a Petition for a Writ of Certiorari dated October 3, 2014. Respondents now file this Return to the Petition for a Writ of Certiorari.

ARGUMENT

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Examples of special and important reasons to issue a writ of certiorari include cases that raise novel issues of law, cases where there is dissent in the decision of the Court of Appeals, cases that directly raise substantial constitutional issues, and cases where the decision of the Court of Appeals conflicts with a prior decision of this Supreme Court and/or the United States Supreme Court. Rule 242(b)(1-5), SCACR. As explained herein, the instant case does not raise any special and important reasons for this Supreme Court to issue a writ of certiorari.

I. The Court of Appeals correctly determined that the Circuit Court's Order filed August 10, 2012, was immediately appealable and that Petitioner failed to timely file a Notice of Appeal.

"A notice of appeal in a civil action must be served on all respondents within thirty (30) days after receipt of a written notice of entry of the order of judgment." Rule 203(b)(1), SCACR. The requirement of service of the notice of appeal is jurisdictional, so that if a party missed the deadline then the appellate court lacks jurisdiction over the appeal. Elam v. South Carolina Department of Transportation, 361 S.C. 9, 14-15 602 S.E.2d 772, 774 (2004); see also Hill v. South Carolina Dep't of Health and Environmental Control, 389 S.C. 1, 698 S.E.2d 612 (2010) (holding that service of the notice of appeal is a jurisdictional requirement).

In this case, the Court of Appeals correctly determined that the Order dated August 10, 2012, granting summary judgment to Tirone was immediately appealable. “An order granting a motion for partial summary judgment is immediately appealable.” Lucas v. Rawl Family Ltd. P’Ship, 2007-MO-058 (S.C. 2007) (citing S.C. Code Ann. § 14-3-330 and 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).

In the August 10, 2012 Order, the Circuit Court determined that Petitioner’s three causes of action against Tirone (breach of contract, breach of contract accompanied by fraudulent act and violation of the Payment of Wages Act) arose from an alleged breach of two employment contracts. The Circuit Court determined that the contracts clearly and unambiguously provided that Tirone individually was not a party to the contracts and that Tirone individually was not a proper defendant in this litigation. (R.pp.11-12). Petitioner also argued that “he **may** seek to pierce the corporate veil” The Circuit Court found that nothing in Petitioner’s three separate counterclaim pleadings, filed over the course of twelve months, set forth any basic facts relating to or requested relief in the form of piercing the corporate veil and that Tirone was entitled to summary judgment as to all of Petitioner’s claims. (R.pp.12-13).

In this case, the Circuit Court granted summary judgment to Tirone on all causes of action raised against her. For this reason, Petitioner’s reliance on Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011) is misplaced. In Thornton, SCE&G moved for summary judgment, and the trial court denied the motion in part but granted the motion for summary judgment as to claims the Thorntons might try to assert under the South Carolina Mining Act. Id. at 300, 306, 705 S.E.2d at 477, 480. Thus, the Court of Appeals addressed the

“unique situation in which the trial court granted a motion for summary judgment as to cause of action the Thorntons never pled.” Id. at 306, 705 S.E.2d at 480. The Court of Appeals concluded that an order which only granted summary judgment as to a cause of action never raised by the Thorntons did not involve the merits or affect a substantial right and thus was not immediately appealable. Id.

In the instant case, however, the Circuit Court granted summary judgment on all three causes of action actually raised against Tirone and determined that arguments that Petitioner “may” raise in the future were not sufficient to keep her in the case. Accordingly, the Circuit Court’s Order of August 10, 2012, does involve the merits and affect a substantial right and was immediately appealable.

Further, Petitioner’s reliance on State ex rel. McLeod v. C&L Corp., Inc., 280 S.C. 519, 313, S.E.2d 344 (Ct. App. 1984), is misplaced. Petitioner relies on McLeod to support his argument that an order dismissing some but not all of the defendants in an action is not final or appealable. However, the Court of Appeals abrogated McLeod in Murphy v. Owens-Corning Fiberglass Corp., 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2002) (overruled on other grounds). In Murphy, the Court of Appeals stated, “[v]iewing McLeod in light of Lebovitz and Link, we conclude an order granting a Rule 12 motion as to some, but not all of the defendants in a case, is directly appealable under Section 14-3-330(2) because it affects a substantial right and strikes out part of a pleading.” Id. at 44-45, 550 S.E.2d at 592. In the instant case, the Circuit Court’s Order of August 10, 2012, totally and completely dismissed Tirone from the litigation and thus is directly appealable.

Petitioner has recognized that the August 10, 2012, order is directly appealable in other documents in this case. Petitioner sent a letter dated January 9, 2013, in response to the Court of

Appeals' request for a response regarding the appealability of the orders challenged, and stated 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." Appellant's Letter to Court of Appeals dated January 9, 2013. Further, Petitioner filed his motion under Rule 60(b)(2). (R.p.324). By its terms, Rule 60(b) applies only to final orders: "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a **final judgment, order, or proceeding** for the following reasons. . . ." Rule 60(b), SCRCF (emphasis added). Thus, by filing his Rule 60(b) Motion, Petitioner admitted that the Order dated August 10, 2012, was a final Order and thus was immediately appealable.

For these reasons, the Court of Appeals correctly held that the Order filed on August 10, 2012, dismissed Respondent Helena Tirone as a party to the instant lawsuit and thus was an order involving the merits of the case.

II. Assuming arguendo that the Circuit Court's Order filed on August 10, 2012, was not immediately appealable, Petitioner was still required to file a Rule 59(e), SCRCF, to preserve issues for appellate review.

An appellate court cannot address an issue unless it was raised to and ruled upon by the trial court. E.g., Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004); Hardaway Concrete Co., Inc., v. Hall Contracting Corp., 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007). In his brief and Petition, Petitioner complains that the Circuit Court did not address issues raised during the motions hearing in his Order filed August 10, 2012. However, Petitioner did not file a timely Rule 59(e), SCRCF, motion relating to the August 10, 2012, Order. Therefore, these issues simply are not preserved for review.

III. Even if Petitioner had timely filed a Motion to Reconsider and timely filed a Notice of Appeal and preserved all issues for review, the Circuit Court properly granted summary judgment to Tirone.

- a. Petitioner waived any argument related to Tirone's individual liability under the employment contracts, and even if Petitioner did not waive them, the arguments have no merit.*

Before the Court of Appeals, Petitioner asserted 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 the employment Contracts. However, Petitioner failed to provide any argument to support the assertion. Therefore, Petitioner waived any argument related to Tirone's individual liability under the employment contracts, as the Court of Appeals correctly held. 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). Further, Petitioner's Petition for a Writ of Certiorari does not include any argument relating to Tirone's individual liability under the employments contracts. See Rule 242(d), SCACR.

Even if Petitioner did not waive such an argument, the argument has no merit. A review of the 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, Petitioner 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).

b. The Circuit Court correctly granted summary judgment to Tirone regarding veil piercing after finding that Petitioner failed to include any facts or allegations related to veil piercing in his Counterclaim, First Amended Counterclaim, or Second Amended Counterclaims.

Rule 8(a), SCRC, requires that all pleadings that set forth a cause of action or counterclaim must contain, among other things, “a short and plain statement of the **facts** showing that the pleader is entitled to relief” and “a prayer or demand for judgment for **the relief to which he deems himself entitled.**” Rule 8(a), SCRC (emphasis added). Therefore, Petitioner 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). Indeed, 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). Accordingly, a party seeking to pierce the corporate veil must provide notice of its theory of liability to the opposing party in the pleadings. Drury Dev. Corp. v. Foundation Ins. Co., 380 S.C. 97, 102, 668 S.E.2d 798, 802 (2008) (“so 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.”).

A review of Petitioner’s three counterclaim pleadings reveals that there were never any allegations or facts that would put Tirone and Respondent Truman’s Eclectic Irish Pub, Inc. on notice that Petitioner was seeking to pierce the corporate veil or hold Tirone responsible for the debts of the corporation. 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).

c. Even if facts to support veil piercing were pled, Petitioner testified himself out of any veil piercing argument.

If a veil piercing claim had actually be raised, Petitioner's own deposition testimony conclusively shows that he has no evidence to establish the factors for piercing the corporate veil as stated in cases such as Multimedia Publ'g of S.C. v. Mullins, 314 S.C. 551, 431 S.E.2d 569 (1993), and Sturkie v. Sifly, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984):

(1) Petitioner testified that "Tirone contributed a sufficient amount of money to conduct the business of [the corporation]" (R. p. 350, lines 22-25) so that there was no undercapitalization;

(2) Petitioner testified under oath that the corporation had "functioning officers and directors" (R. p. 355, lines 4-6);

(3) Petitioner testified during his deposition that there were “corporate records,” that he attended “the Corporation’s first Board Meeting,” and “minutes were taken of meetings.” (R. p. 355, lines 7-10; pp. 429, ¶ 20);

(4) Petitioner 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);

(5) Petitioner testified that he did not have any evidence that Tirone misappropriated money from the corporation. (R. p. 355, lines 16-19);

(6) Petitioner 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); and

(7) Petitioner said 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, since Petitioner’s testimony proves that the factors to pierce the corporate veil are not present, then nothing in Tirone’s deposition would have changed the ultimate outcome and/or been material had Petitioner actually made a veil piercing claim.

d. If veil piercing had been pled and if Petitioner had not testified himself out of the claim, it would be legally impermissible to disregard the corporate veil in the instant case because the corporate form may only be disregarded to assist a third party.

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, Petitioner alleges that he and Tirone were “partners in a joint venture” and were “equal partners.” (R. p. 218; pp. 221-222). Petitioner 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 ever been asserted.

For these reasons, the Circuit Court did not err in granting summary judgment to Tirone, and the Court of Appeals did not err in affirming that decision.

IV. The Court of Appeals correctly affirmed the Circuit Court’s Order denying Petitioner’s Rule 60(b) Motion because there is no newly-discovered evidence.

The decision to grant or deny a motion made under Rule 60, SCRPC, 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 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).

Petitioner contends receiving the deposition transcript of Respondent Tirone after the summary judgment hearing constitutes newly discovered evidence sufficient to set aside a final judgment or order pursuant to Rule 60(b), SCRCP. This contention is incorrect.

To obtain relief from a judgment based on newly discovered evidence, the moving party 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.” Lanier v. Lanier, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005).

a. Result would not change/material to the issue

As to Factor 1 (will probably change the result) and Factor 4 (material to the issue), the Court of Appeals correctly determined that Tirone’s deposition transcript would not probably change the result if a new hearing were held and is not material to the issues before the court.

First, the Circuit Court’s Order turned on Petitioner’s failure to even raise a veil piercing claim, not on a lack of evidence in the record. In his Petition for a Writ of Certiorari, Petitioner’s arguments totally ignore this critical fact and analyze his case as if a veil piercing claim had actually been pled. Despite being given three separate opportunities to amend his pleading, veil piercing was never mentioned, and no facts were ever alleged to support veil piercing. It is not reversible error to hold that Petitioner is not entitled to proceed on a theory of recovery he never mentioned in his three pleadings.

Second, if a veil piercing claim had actually been raised, Petitioner’s own deposition testimony conclusively shows that he had no evidence to establish the factors for piercing the corporate veil. See Section III, c, supra.

b. Discovered since trial/could not have been discovered since trial

As to Factor 2 (has been discovered since the trial) and Factor 3 (could not have been discovered before the trial), Tirone's deposition testimony was not "discovered" after the hearing and certainly could have been taken once the lawsuit was filed. First, the Motion for Summary Judgment was dated June 21, 2012, a month before the hearing on Tirone's Motion for Summary Judgment. (R.pp.213(a)-214). Nevertheless, Tirone's deposition was taken on July 27, 2012, **before** the hearing on the Motion for Summary Judgment. (R.p.iii). In fact, Petitioner's Memorandum relating to the Motions heard in July 30, 2012, actually references Tirone's deposition testimony. (R.pp.224-225, 229, 230). Second, pursuant to Rule 30(a)(1), SCRPC, Petitioner had the ability to notice the deposition of Tirone after the instant lawsuit was filed on May 20, 2011, more than a year before Tirone moved for summary judgment. Petitioner could have also requested an expedited copy of the deposition transcript, which apparently, he did not.

c. The deposition testimony was cumulative

As to Factor 5, Tirone's deposition testimony was cumulative to other discovery provided in the case, including but not limited to Petitioner's own deposition. For example, Petitioner 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 Petitioner on or about October 14, 2011, in response to Petitioner's First Request for Production 13. (R. p. 292). Further, the answer to Petitioner's Interrogatory 11, provided to Petitioner on or about October 14, 2011, lists the money paid by Respondent Helena Tirone. (R. p. 310).

Accordingly, the Court of Appeals correctly found that the Circuit Court did not abuse its discretion in denying Petitioner's Rule 60(b) Motion.

V. The Court of Appeals did not commit reversible error when it did not rule upon Petitioner's arguments that were not properly presented to the trial court and not properly preserved for review.

Petitioner argues that the Court of Appeals erred in failing to address his Motion to Amend and Motion for a Continuance. As set forth below, the Court of Appeals did not err.

a. Petitioner never filed proper motions to be ruled on by the Circuit Court

Petitioner never actually filed a Motion to Amend or a Motion for a Continuance. As to the Motion for a Continuance, Petitioner, in the Memorandum of Law prepared for the July 30, 2012, hearing, and at the hearing, 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). As to the Motion to Amend, in his Memorandum of Law prepared for the July 30, 2012 hearing, Petitioner 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). During the July 30, 2012, hearing, Petitioner 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, Petitioner states that "[t]o the extent a motion to amend the counterclaim is necessary, Defendant also makes such a motion." (R. p. 324).

Petitioner's footnotes and Memorandum of Law do not constitute a proper motion. Under Rule 7(b), SCRCPP, a written motion must state with peculiarity the grounds of the motion, and set forth the relief or order sought. Rule (7)(b)(1), SCRCPP. For a Motion to Amend, setting forth the relief sought almost always includes submitting the proposed amended pleading. Rule (7)(b)(1), SCRCPP. Further, Rule 11, SCRCPP, 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), SCRPC. 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 motions 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. The Memorandum of Law and a footnote in the Motion to Reconsider do not constitute the required Rule 11 certifications. Further, no motion cover sheet or filing fee was filed by Petitioner. Accordingly, no proper motion for a continuance and motion to amend were made.

b. If motions were properly made, they were never ruled upon, and no motion to reconsider was ever filed

Assuming what Petitioner did before and during the Circuit Court hearing constituted the proper presentation of motions to amend and to continue, the Circuit Court never ruled on the motions. Because the trial court never ruled on the motions, Petitioner was required to file a Rule 59 motion to reconsider within 10 days after he received the order. Rule 59, SCRPC. Petitioner did not file a motion to reconsider requesting that the trial court rule on his would-be "motion" to amend or motion to continue. Therefore, because the matters at issue related to the motion to amend and to continue were never raised to and ruled upon by the Circuit Court, they were not properly preserved for appellant review.

c. Even if the motions were properly made, raised, and ruled upon the Circuit Court, the Circuit Court properly denied these motions, and it is not reversible error for the Court of Appeals not to specifically address these motions in its Opinion.

As to the Motion for a Continuance, “[r]eversals 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 tenet 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), SCRPC, 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), SCRPC. Here, Petitioner did not present any such affidavit to the Circuit Court as required by Rule 56(f). Therefore, the Circuit Court was justified in failing to grant the improper request for a continuance.

Presumably, Petitioner’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. Again, however, the Circuit Court’s order granting summary judgment did not turn on a lack of evidence, but a defect in Petitioner’s three counterclaim pleadings. In addition, Tirone’s deposition transcript was cumulative to the other evidence presented.

As to a motion to amend, “[t]he 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), SCRCF. In this case, Respondents would be prejudiced by allowing Petitioner to amend his Answer and Counterclaim for a third time to add new issue (veil piercing) not contained in the three prior pleadings. As Respondents informed the Circuit Court, 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, the Court of Appeals committed no error in its Opinion.³

CONCLUSION

As discussed herein, Petitioner has failed to establish that the Court of Appeals committed any error in affirming the Circuit Court's Order granting summary judgment to Respondent Tirone, much less that establish any special and important reason for this Court to grant a writ of certiorari. Therefore the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

³ 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), SCRCF and Foggie v. CSX Transportation, Inc., 313 S.C. 98, 431 S.E.2d 587 (1993)." (R. p. 17). Allowing Petitioner 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.

TWENGE + TWOMBLEY LAW FIRM

BY:



J. ASHLEY TWOMBLEY

S.C. Bar #72916

311 Carteret Street

Beaufort, SC 29902

Telephone: (843) 982-0100

Facsimile: (843) 982-0103

www.twlawfirm.com

Attorneys for Respondents

Beaufort, South Carolina

October 31, 2014

EXHIBIT A

André Rembert, Esquire
2302 Mount Pleasant Street
Charleston, SC 29403
andrerebert@gmail.com
843-518-3232

9 January 2013

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

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

Dear Ms. Allen,

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

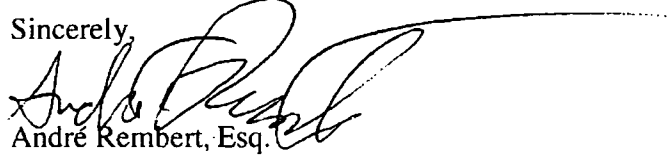
The denial of a motion under rule 60, SCRCF, is immediately appealable. *Ex parte Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals*, 340 S.C. 57, 530 S.E.2d 383 (2000) (citing *Winesett v. Winesett*, 287 S. C. 332, 338 S.E.2d 340 (1985)). Dailey is appealing the denial of his Rule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

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

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

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

Sincerely,


André Rembert, Esq.

cc: J. Ashley Twombly
enclosure

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Unpublished Opinion No. 2014-UP-203 (S.C. Ct. App. Filed May 28, 2014)
Appellate Case No.: 2014-002095

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

-vs.-

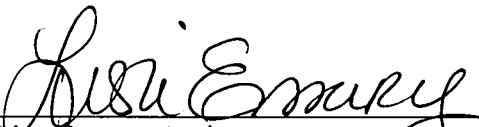
THOMAS W. DAILEYPetitioner

CERTIFICATE OF SERVICE

The undersigned, Lisa Essary, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Respondents, and that on the 31st day of October 2014 a true and accurate copy of the attached of Respondents' Return to Petitioner's Petition for Writ of Certiorari 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
Attorney at Law
P.O. Box 20341
Charleston, SC 29413
Telephone: (843) 518-3232
andrerembert@gmail.com
Attorney for Petitioner

BY:



Lisa Essary, Assistant to
TWENGE + TWOMBLEY LAW FIRM

TWENGE + TWOMBLEY LAW FIRM LLC

311 CARTERET STREET
BEAUFORT, SOUTH CAROLINA 29902
PH:: 843.982.0100 + FX:: 843.982.0103

WEB:: TWLAWFIRM.COM

J. ASHLEY TWOMBLEY
KARL D. TWENGE
JENNIFER I. CAMPBELL

*** LICENSED IN SC + GA
*** OF COUNSEL

October 31, 2014

Via U.S. Mail

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

NOV 04 2014

S.C. SUPREME COURT

RE: Helena P. Tirone et al. v. Thomas Dailey
Appellate Case No.: 2014-002095

Dear Mr. Shearous:

Please find enclosed the original and seven (7) copies of Respondents' Return to Petitioner's Petition for Writ of Certiorari and Certificate of Service in the referenced matter. I would appreciate it if you would file the original and return a clocked copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving the same upon opposing counsel, André DuBose Rembert, Esquire.

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

With kindest regards, I remain,

Cordially,



J. Ashley Twombley

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