THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Circuit Court
Marvin Dukes, Jr.
Master-in-Equity

Unpublished Opinion No 2014-UP-203 (S.C. Ct.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,

v.

Thomas W. Dailey.....Petitioner.

PETITIONER'S REPLY TO RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

CASES

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

SOUTH CAROLINA RULES OF EVIDENCE

REPLY

I. The respondents misstate the effect of Respondent Tirone's being granted summary judgment in regards to Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297 (Ct. App. 2011)

While the circuit court granted Tirone summary judgment, however, it did not strike the causes of action in and of themselves as they remained as to the corporate entity. As such, contrary to what respondents now claim, the Court's Order of August 10, 2012, did NOT involve the merits on the causes of action as a whole and so was not immediately appealable.

Additionally, respondents are now taking a position inconsistent with their prior arguments as they presented Thornton to the Trial Court on December 7, 2012, to support their position that the Order Granting Summary Judgment was not immediately appealable.

II. The respondents improperly rely on Murphy v. Owens-Corning Fiberglass Corp, 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2002) to posit that State ex rel. McLeod v. C&L Corp., Inc., 280 S.C. 519 (Ct. App. 1984) has been overruled.

While, indeed, that Murphy was overruled on other grounds, the respondents overlook the fact that Murphy is limited to SCRCP 12 (b) Motions to Dismiss, which is not analogous to the facts of both this case nor to McLeod, both of which concern Summary Judgment and not Motions to Dismiss. As the court in Murphy said

> It is correct that the grant of the Rule 12(b)(1) motion in this case is not a final order as there is a remaining defendant. However, the practical effect of the grant of the motion is that it strikes out the Murphys' complaint with

respect to the respondents. Viewing *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**. [emphasis added].

Murphy, 346 S.C. at 44-45.

Again, this case and McLeod were appealed from a Summary Judgment, not a Motion to Dismiss, so Murphy does not control. Additionally, Murphy states specifically that immediate appealability is "because it affects a substantial right and **strikes out part of a pleading**. [emphasis added]" *Id.* That is not present in this case. No pleading has been struck.

III. The Court of Appeals wrongly affirmed the Circuit Court's Order Denying Petitioner's Rule 60(b) Motion because there was, in fact, newly discovered evidence.

Petitioner respectfully avers that the Court of Appeals 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[1] cannot be overemphasized: the South Carolina Supreme Court has

[1] 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

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

A review of the Respondents' Appellate 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.[2] 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 Petitioner's arguments.

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

Petitioner 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 Petitioner 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

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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.

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 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.
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> 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*.

Accordingly, in light of the arguments of the original petition and this reply, the Petitioner renews his request of this Court to grant a Writ of Certiorari or reverse the Court of Appeals, thus allowing a new, full, and fair hearing on the merits of Respondent Tirone's Motion for Summary Judgment.

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PROOF OF SERVICE

I, André Rembert, attorney for the Petitioner, 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: PETITIONER'S REPLY TO RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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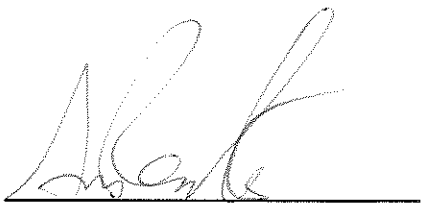

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Dated: November 12, 2014