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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

S.C. Supreme Court

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Op. No. 2015-UP-030 (S.C. Ct. App. filed Jan. 14, 2015)

Quentin S. Broom, Jr., ..... Petitioner,

v.

Ten State Street, LLP, Timothy D. Scranton,  
Mark Broadwater, and H. Hugh Andrews, ..... Defendants,

Of whom

H. Hugh Andrews, Individually  
and on behalf of Tri-Star  
Communications, Inc. is the, ..... Respondent,

v.

Quentin S. Broom, Jr., ..... Third-party Defendant.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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    Did the Court of Appeals err when it remanded this case for the trial court to  
    decide a motion that—on the petitioner’s best day—is *still pending* rather  
    than “unpreserved” for review?

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## QUESTION PRESENTED

The respondent proposes the following as the single question presented:

Did the Court of Appeals err when it remanded this case for the trial court to decide a motion that—on the petitioner’s best day—is *still pending* rather than “unpreserved” for review?

(This encompasses the petitioner’s questions 1 and 2)

## STATEMENT OF THE CASE

The respondent in this case is Hugh Andrews. He generally agrees with the petitioner’s Statement of the Case but would add the following as additional background information.

*First*, this case is a dispute between business partners, and at its core, the case is about a business that is divided against itself. Tri-Star Communications is a corporation that is locked in limbo. It cannot function because its two (2) equal shareholders—the petitioner and the respondent—are suing each other.

*Second*, the circuit court’s order of dismissal is based on a pleading defect that nobody can seriously contend was prejudicial. If a shareholder of a corporation wishes to file a derivative lawsuit, he must comply with special pleading rules like verifying the complaint, alleging that he will fairly represent the interests of other affected shareholders, and explaining that he has asked the board of directors to satisfy his concerns or that such a demand would be futile. These rules are contained in Rule 23, SCRCP, and everyone agrees that the purpose of these rules is to ensure that corporate assets are not wasted on defending frivolous lawsuits. See generally (App. pp. 332, 388-390) (from the briefs filed below).

The petitioner litigated Mr. Andrews' counterclaims for over five (5) years before he raised an issue about whether the counterclaims were "derivative" and whether Mr. Andrews should have followed Rule 23. The petitioner knows that the counterclaims are not frivolous grievances—when the two owners of a company are suing each other, they need a third party like the court to settle their differences. The argument about defective pleadings is a ploy. The motion to dismiss was designed to stop legitimate claims from going to trial.

*Finally*, while Mr. Andrews believes that the only logical implication of a circuit court order that dismisses a case "with prejudice" is that any motion to amend is being denied as well, a possible explanation—if not the probable explanation—of the circuit court's failure to specifically mention the motion to amend is that the petitioner told the circuit court the motion to amend was improper because Mr. Andrews' counterclaims had already been dismissed. (App. p. 315, ll. 2-16). The petitioner said that Mr. Andrews "will not be prohibited before the appellate courts if that's where this is headed from making the arguments that are contained within this proposed [filing] . . . [but] you can't amend something that doesn't exist." *Id.* Thus, when the petitioner says Mr. Andrews' argument about being denied the chance to amend his complaint is not preserved, it looks an awful lot like the petitioner is taking a position that is contrary to the position he took below.

## **ARGUMENT**

The petitioner is not raising a novel issue. There was no disagreement among the members of the panel at the Court of Appeals, the decision of the Court of Appeals does not conflict with prior decisions of this Court, and this case does not involve a constitutional

question. See Rule 242, SCACR (describing some of the considerations that this Court may deem relevant in deciding a request for a writ of certiorari).

The Court of Appeals remanded this case because it took the view that the motion to amend had never been decided. That disposition follows this Court's precedent, which seems to counsel that the service of a notice of appeal does not deprive the lower court of jurisdiction to consider pending motions as long as the motions are timely.

One of the principal cases on this topic is *Hudson v. Hudson*, a case that involves post-trial motions that are filed pursuant to Rule 59. Hudson explains that in the event post-trial motions are filed, either simultaneously with or after the filing of a notice of appeal, the proper approach is to dismiss the appeal without prejudice. See 290 S.C. 215, 216, 349 S.E.2d 341, 341 (1986). This is because the lower court retains jurisdiction to decide a motion that is properly filed.

That process is the functional equivalent of the process the Court of Appeals used here. The Court of Appeals did not dismiss this appeal, but it accomplished the same end by way of a remand. The variance in verbiage between a dismissal and a remand would not seem to make any sort of a meaningful difference, and this Court is familiar with the principle that "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

The ultimate problem with the petitioner's position is that he cannot honestly contend that there is a legitimate justification for the circuit court to deny the motion to amend. The rules of civil procedure "shall be construed to secure the just, speedy, and inexpensive" decision of every action, Rule 1, SCRCP, and leave to amend pleadings "shall be freely given

when justice so requires and does not prejudice the other party.” Rule 15(a), SCRCPP. The upshot is that either way, the petitioner loses. Either the petitioner loses because the circuit court’s rejection of the motion to amend is clearly erroneous, or the petitioner loses because the circuit court did not decide the motion to amend and the motion is still pending. It is hard to see why the debate matters when both vehicles are defensible.

Even if the petitioner was right about error preservation, the law seems to suggest that the petitioner would still lose. Let us assume that the petitioner is right about Mr. Andrews’ pleadings being defective. This Court’s decision in *Spence v. Spence* explains that when a plaintiff’s claim is dismissed based on a pleading defect, the plaintiff should generally be given an opportunity to cure defects in his pleadings, even if the statute of limitations has expired. 368 S.C. 106, 129-131, 628 S.E.2d 869, 881-82 (2006). When the plaintiff is denied this opportunity, an appellate court has the discretion to affirm the order of dismissal but modify the order to find that the dismissal is without prejudice. *Id.* at 130, 628 S.E.2d at 881. *Spence* appears to say that most parties should get at least one chance to fix a defective pleading.

Nobody could seriously contend that this approach would not apply to the present case. Hugh Andrews believes that his business partner is a thief. He admitted that he did not follow Rule 23—Mr. Andrews did not ask the petitioner to sue himself, Mr. Andrews is the only similarly situated shareholder, and any demand for relief is obviously futile because the corporation in question is locked in a tug-of-war between its two owners. If all of this procedural fencing is over whether Mr. Andrews should have verified his complaint, let the case be remanded so that the complaint can be verified and this case can be tried.

**CONCLUSION**

The Court of Appeals has reached a defensible result that furthers the ends of justice.

It was appropriate to remand. This Court should deny the petition.

May 5, 2015

Respectfully submitted,



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**PROOF OF SERVICE**

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner with a copy of the *Return to Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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