

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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Case No. 2012-CP-23-06209

Case No. 2012-CP-23-06211

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Emil P. Kondra, individually, and as  
Trustee of Emil P. Kondra Revocable  
Trust, Emil P. Kondra, LLC, Emil P.  
Kondra Family Trust, Eileen Saxton  
and Douglass E. Kondra, as Trustees  
of the Emil P. Kondra Family Trust,  
Douglass E. Kondra, Helen Perry,  
and Lawrence F. D'Alessio,

Respondents,

v.

Robert A. Nitsch and Veronica G. -  
Nitsch, Individually, and as Trustees  
of the Amended and Restated  
Veronica G. Nitsch Revocable Trust  
and the Amended and Restated  
Robert A. Nitsch Revocable Trust

Appellants.

John M. Campbell, Jr., Esq.,

Respondents,

v.

Robert A. Nitsch and Veronica G.  
Nitsch, Individually, and as Trustees  
of the Amended and Restated  
Veronica G. Nitsch Revocable Trust  
and the Amended and Restated  
Robert A. Nitsch Revocable Trust

Appellants.

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INITIAL REPLY BRIEF OF APPELLANTS

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SC Court of Appeals

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June 24, 2016

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....1

TABLE OF AUTHORITIES .....2

ARGUMENT

**I. This appeal is timely and is not barred by the law of the case doctrine. ....3**

**II. Respondents cannot establish a basis for summary judgment by relying on their own pleadings, insisting that inferences be drawn in their favor, and ignoring evidentiary disputes. ....4**

**III. Summary judgment should not be granted without further discovery. ....7**

CONCLUSION .....9

**TABLE OF AUTHORITIES**

**Cases**

*Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399 (2014).....7

*Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 597 S.E.2d 27 (Ct. App. 2004) .....9

*David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 626 S.E.2d 1 (2006).....7

*Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 151 (2009) .....3

*Lancaster v. Fielder*, 305 S.C. 418, 409 S.E.2d 375 (1991).....3

*Milligan v. Liberty Life Ins. Co.*, 313 S.C. 478, 443 S.E.2d 381 (1994).....5

*Ross v. Med. Univ.*, 328 S.C. 51, 492 S.E.2d 62 (1997).....4

*Stokes-Craven Holding Corp. v. Robinson*, Op. No. 27572  
(S.C. Sup. Ct. filed May 25, 2016) (Shearouse Adv. Sh. No. 21 at 18).....9

**Statutes**

S.C. Code Ann. § 14-3-330(2) .....3

**Rules of Procedure**

Rule 56(e), South Carolina Rules of Civil Procedure.....5

## ARGUMENT

### **I. This appeal is timely and is not barred by the law of the case doctrine.**

When a trial court makes a non-final ruling that affects a substantial right of the non-prevailing party and has the effect of striking a part of that party's pleading, that party may take an interlocutory appeal. S.C. Code Ann. § 14-3-330(2). Alternatively, the party may elect to wait and appeal the ruling after a final judgment is obtained. *Lancaster v. Fielder*, 305 S.C. 418, 421-22, 409 S.E.2d 375, 377 (1991). In other words, it is up to the non-prevailing party whether to appeal the ruling immediately or wait until a final judgment is rendered.

Respondents argue that the trial court's orders adopting the Report and Recommendation of the Discovery Referee and denying Appellants' motion to reconsider were rulings "effectively striking out part of an Answer." (Resp. Brief 11.) Respondents assert that when Appellants appealed the separate summary judgment order, "they were required to at the same time appeal the prior order adopting the R&R and the order denying the motion to reconsider that order, which also contained a final legal disposition that the counterclaims were time-barred." (Resp. Brief 12.) According to Respondents, the orders adopting the Report and Recommendation of the Discovery Referee and denying Appellants' motion to reconsider have become "the law of the case." (*Id.* at 11.) This argument reflects a fundamental misunderstanding of the law of the case doctrine.

"Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (emphasis added). "The doctrine of the law of the case

prohibits issues which have been decided in a prior appeal from being relitigated in the trial court in the same case.” *Ross v. Med. Univ.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) (emphasis added). Here, there have been no prior appeals. The trial court adopted the Discovery Referee’s findings and then issued an order denying reconsideration. Less than one month later, Appellant filed this appeal of the separate order in which the trial court granted Respondents summary judgment. Thus, even to the extent the summary judgment order overlaps or incorporates findings in the other orders, such findings are not the law of the case. The bottom line is that Appellants timely appealed the summary judgment order, which is the only order of relevance to this appeal.<sup>1</sup>

**II. Respondents cannot establish a basis for summary judgment by relying on their own pleadings, insisting that inferences be drawn in their favor, and ignoring evidentiary disputes.**

As explained in Appellants’ opening brief, the trial court’s decision to grant summary judgment in this case was based entirely on affidavits submitted by Veronica Nitsch. Appellants demonstrated that their claims derive in significant part from a variety of post-merger conduct not addressed in the affidavits. (App. Brief 13.)

Shifting their strategy on appeal, Respondents now look to their own pleadings for a source of *post hoc* support for the decision below. Their Counter-Statement of Facts consists almost entirely of material from the Kondra Respondents’ pleadings.<sup>2</sup> (Resp. Brief

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<sup>1</sup> Respondents contend that it was “made clear at the motion hearing” that the summary judgment ruling was merely “administrative” because the statute of limitations issue had already been decided and was the law of the case. (Resp. Brief 12.) But the cited passage from the hearing is from Respondents’ counsel’s own argument, not any pronouncement by the trial court. The motion hearing consisted of argument on the merits of the statute of limitations issue.

<sup>2</sup> As explained in Appellants’ Brief, Campbell did not serve or file a Reply to the Counterclaims against him. (App. Brief 6, 8 (n. 1), 18, 22.) Campbell thus relies entirely on another party’s pleadings in another case.

6-9.) A single page of Respondents' Counter-Statement of Facts contains nine citations to the Kondra Respondents' Reply to Appellants' Counterclaims, and exhibits thereto, and not a single citation to any other source in the record. (*Id.* p. 7.) None of the exhibits cited have been authenticated by affidavit or deposition testimony.

The standard for evidence offered in support of a motion for summary judgment stands in sharp contrast to Respondents' near-complete reliance on its own pleadings:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

Rule 56(e), S.C.R.Civ.P. Particularly when summary judgment is sought on an affirmative defense, such that the moving party has the burden of proof at trial, it is incumbent on the moving party to submit evidence that the material facts pertinent to its defense are undisputed. *Milligan v. Liberty Life Ins. Co.*, 313 S.C. 478, 481, 443 S.E.2d 381, 382 (1994). This Court should reject the use of unverified pleadings to support Respondents' summary judgment motions.

In addition to relying on their own pleadings, Respondents urge this Court to draw inferences in their favor and to take their side in factual disputes. For example, Respondents contend that as a Board Member prior to the merger, Robert Nitsch "had access to the financial records and the Ellcon Stock Book at all times since 1964," citing the Kondra Respondents' Complaint and Appellants' Answer. (Resp. Brief 18, n. 10; 21-22.) However, Appellants' Answer expressly denies those very allegations. (Kondra Respondents' Complaint ¶¶ 14, 15; Appellants' Answer ¶¶ 14, 15.) Moreover, Appellants

have specifically alleged that Respondents denied them access to the Stock Book. (Counterclaims against Kondra Respondents ¶¶ 7, 13, 45, 46, 47, 53, 58; Counterclaims against Campbell ¶¶ 28, 29, 36, 41, 47, 59, 67). While it is possible that a jury might eventually take Respondents' side in this factual dispute, it is completely inappropriate to submit a plainly disputed fact as a basis for seeking summary judgment.

Likewise, Respondents cite paragraphs 104 through 107 of Appellants' Counterclaims against the Kondra Defendants, claiming that Appellants alleged that "Douglass [Kondra] owed the Nitsches a fiduciary duty dating back at least to the time of the merger and has been in constant breach of that duty ever since, giving rise to a single indivisible injury . . ." (Resp. Brief 23.) The cited paragraphs neither state nor imply that there has been a "single indivisible injury," but instead articulate discrete and distinct claims based on (1) the non-payment of merger proceeds eighteen months after the merger closed and (2) Respondents' improper attempt to condition payment on the signing of a release. (Respondents' Counterclaims against Kondra Respondents ¶¶ 104-07.) Relying on their inaccurate characterization of Appellants' pleadings as articulating "a single indivisible injury," Respondents proceed to cite a series of cases involving "an ongoing tort [that] is permanent in nature and gives rise to a single injury." (Resp. Brief 23-24.) Appellants' claims in this case involve specific allegations of particular activities giving rise to separate injuries – under no reasonable reading can such allegations be characterized as claiming a single injury.

Respondents assert that their failure to make post-merger distributions as required "cannot save [Appellants'] counterclaims because the only claim to which [such allegation] is relevant was dismissed years ago." (Resp. Brief 22.) However, the fraud claim against

Campbell, which has not been dismissed, expressly incorporates the paragraph in which Appellants alleged that Campbell was responsible for the failure to pay post-merger distributions. (Counterclaims against Campbell ¶¶ 23, 46.) Moreover, the claims against the Kondra Respondents include specific allegations surrounding the non-payment of post-merger distributions. (Counterclaims against Kondra Respondents ¶¶ 22, 33, 34, 104-07.) Once again, Respondents' argument hinges on an unreasonably narrow construction of Appellants' claims. This is not permitted under the Rule 56 standard. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) (all reasonable inferences are to be drawn in favor of the non-moving party).

Respondents' attempts to paper over defects in the evidentiary support for their motions merely highlight the severity of those defects. It is axiomatic that all facts and reasonable inferences therefrom are to be resolved in favor of the non-moving party, and summary judgment should be denied if there is disagreement concerning the conclusions to be drawn from the facts. *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 575, 757 S.E.2d 399, 404 (2014); *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). This case should be remanded so that the parties can complete discovery and, if appropriate, properly supported dispositive motions can be made.

### **III. Summary judgment should not be granted without further discovery.**

Respondents argue that further discovery is not needed, arguing specifically that Helen Perry need not be deposed despite being the custodian of the Stock Book during the time period in question. (Resp. Brief 27-28.) Respondents contend that because Veronica Nitsch knew or believed that Helen Perry was allegedly destroying certain corporate documents, there is no need to conduct discovery into her handling of the Stock

Book or alleged creation of a second Stock Book. (*Id.*) But these are entirely separate issues. Respondents are asking this Court to assume, without any supporting evidence, that the suspected document destruction referenced in Veronica Nitsch's affidavits was sufficiently related to Perry's handling of the Stock Books that knowledge of one equates to knowledge of the other. There is absolutely nothing in the record, and nothing cited by Respondents, to substantiate this assumption. Once again, inferences are to be drawn in favor of the non-moving party – Respondents cannot just wish away questions of fact.

Beyond the specifics of the Stock Book, the need for additional discovery in this case is manifest. When summary judgment was granted, neither party had completed written discovery or depositions. Prior to the Discovery Referee's *sua sponte* decision to inject the statute of limitations issue into the case,<sup>3</sup> no dispositive motions had been filed. Campbell had not even replied to the Counterclaims, and his motion to dismiss did not include any statute of limitations argument. In other words, Campbell had no apparent intention of even asserting a statute of limitations defense. Even in this appeal, Respondents rely to a significant extent not on the record evidence but on their own pleadings.

Respondents also return repeatedly to the Veronica Nitsch affidavits, arguing that because she suspected some kind of wrongdoing prior to 2008, all of the discrete claims

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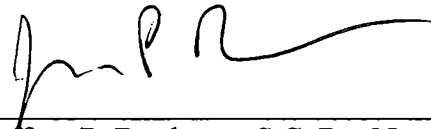
<sup>3</sup> Respondents argue that the statute of limitations issue came up at the hearing before the Discovery Referee, when he inquired of Appellants' counsel whether the documents Veronica Nitsch obtained from Helen Kondra should have "put Ms. Nitsch on notice that something was going on that was at least peculiar." (Resp. Brief 31-32, quoting April 1, 2015 Transcript at 44:5-19.) However, the reference to "something was going on that was at least peculiar" had to do with the circumstances in which the documents were being provided, not the possibility of wrongdoing by Respondents. (April 1, 2015 Transcript at 44:5-45:19.) The record reflects no discussion or analysis of the statute of limitations issue during the hearing or in any of the extensive correspondence with the Discovery Referee prior to his Report and Recommendation.

in this case must be time-barred. But the affidavits do not address the particular injuries for which Appellants seek redress in this case. *See, Stokes-Craven Holding Corp. v. Robinson*, Op. No. 27572 (S.C. Sup. Ct. filed May 25, 2016) (Shearouse Adv. Sh. No. 21 at 18, 28) (“Because a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued.”); *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371-72, 597 S.E.2d 27, 29 (Ct. App. 2004) (the trigger for the limitations period to begin running is discovery of the injury, rather than when the underlying acts or omissions occurred). Because the record reflects disputed issues of fact concerning Appellants’ discovery of their injuries, this case simply is not ripe for summary judgment.

#### CONCLUSION

Respondents’ arguments rely on bare assertions from their pleadings and unjustified assumptions and inferences. They cannot establish a factual basis in the record to support the trial court’s premature and unwarranted entry of summary judgment. Accordingly, the trial court should be reversed and this matter remanded for the completion of discovery.

Respectfully submitted,



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This 24th day of June, 2016.