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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr, Circuit Court Judge

Case No. 2015-000593

RECEIVED

JUL 10 2017

SC Court of Appeals

Ronald J. Ferguson

Appellant,

v.

John D. Hatcher, Rachel Shaluly, James F. Gilbert,
Molly A. Miller, and Michael Stehney, individually
and as members of the Architectural Committee of
Mill Creek Estates,

Respondent.

PETITION FOR REHEARING FROM ORDER DISMISSING APPEAL

Ronald J. Ferguson
103 Mill Creek Rd
Piedmont, SC 29673
(864) 509-0169
Appellant pro-se

SCACR RULES 221(c) & 240(i)

In accordance with Rules 221(c) & 240(i), SCACR, Appellant would have the record reflect that the Honorable Letitica Verdin had entered an Order of Default against Defendant in this matter and was pending a damages hearing when the motion to intervene was filed. Accordingly, if the trial court's order is vacated for failure to comply with the rules of civil procedure and applicable case law, it has the effect of "dismissing or finally deciding a party's appeal."

ISSUES PRESENTED

- I. Did the Court of Appeals review the conduct of the trial court conduct based on Rule 24 and 5, SCRCF, under the criteria set forth in *Davis v. Jennings* and *Ex Parte Reichlyn*?
- II. Did Intervenors failure to disclose their ex parte communications with Master-in-Equity Charles B. Simmons, Jr., regarding this case some two months prior to filing the motion to intervene affect the trial court's consideration of the elements in *Davis v. Jennings* which preclude the issuance of an order granting intervention under *Ex Parte Reichlyn*

I

Rule 24(c), SCRCF provides, in part,

"A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the ground therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

In the case at bar the intervenors had months of knowledge regarding the case and only decided to file a motion to intervene when Judge Verdin issued the Order of Default and set a continuance for a damages hearing and they decided it may affect litigation they are pursuing against other parties. As the record duly reflects, the only pleading ever filed is a Motion to Intervene. There is no "pleading setting forth the claim or defense for which intervention is sought."

The underlying matter involves restrictive covenants signed by a general partner of a business that is still recognized by the State of South Carolina as legally operating. Intervenors, who had nothing

to do with the entity or the contract in question, arguably assert that they should be allowed to argue the merits of the parties who drafted, signed and filed the contract – but they are not in any way liable for any damages which those parties may be legally liable. South Carolina Code and precedent is clear, the general partner and/or the entity is liable for any contract as well as the damages.

Further, the circuit court failed to exercise its discretion by not applying the four-part test to determine whether the motion was timely. See *Callen v. Callen*, 365 S.C. 618, 627, 620 S.E.2d 59, 64 (2005) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.") (quoting *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987)).

II

South Carolina courts have adopted a four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. *Davis v. Jennings*, 304 S.C. 502, 504 405 S.E.2d 601, 603 (1991). Failure to satisfy any one of the four requirements precludes intervention. *Ex Parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661 (1993).

The record has developed to show intervenors and their counsel engaged in ex parte communications with ¹Master-in-Equity Charles B. Simmons, Jr., despite his having nothing to do with this matter, beginning in late October, 2014. As evidenced from the email dated October , 2014,

¹ This would not be the only instance of conduct between Brown and Simmons. Records have come to light showing the pair engaged in ex parte communications beginning in September 2014 involving civil action 2013CP2301810. They were then some of the parties who engaged in a "scheduling conference" on October 5, 2014, with an Order issued October 29, 2014, which involved two cases before the U.S. District Court. A violation of 28 U.S.C. 1446(d) and without subject or personal jurisdiction. Then another ex parte communication started March 4, 2015, involving dissemination of materials codified as confidential and exempt from civil proceedings (40-59-190, 40-1-190) with criminal penalties (See 40-59-200). Simmons has claimed judicial immunity and retained counsel as the Supreme Court deemed U.S. District Court should address the actions first.

Brown advised Simmons. Thereafter, Judge Verdin had a public hearing at the County of Greenville Courthouse on November 4, 2014, and announced the next hearing date to address a Motion for Order of Default would be December 16, 2014. Intervenors chose not to file anything or speak at the November hearing. Judge Verdin entertained the Motion for Default Judgment on December 16, 2014, as scheduled. The Court called the matter in the courtroom and also had the bailiff announce such in the hallway. Intervenors again chose not to speak at the hearing or file any pleadings. It was only after Judge Verdin announced the Order of Default and intent to proceed with a hearing to determine damages did Intervenors decide to file their motion for intervention on December 24, 2014.

The tardiness of Respondent's motion is the strongest reason supporting the underlying hearing and order are violations of due process. "[T]imely application" is required for both intervention as of right and permissive intervention. Gould, 883 F.2d at 286. When, as in this case, a request for intervention is not timely, a court is authorized, if not required, to deny it. See *Houston General*, 193 F.3d at 839 ("[T]imeliness is a cardinal consideration of whether to permit intervention.") (internal quotation marks omitted). The purpose of the timeliness requirement "is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *Scardelletti v. Debarr*, 265 F.3d 195, 202-03 (4th Cir. 2001) (quoting *United States v. South Bend Community Sch. Corp.*, 710 F.2d 394, 396 (7th Cir. 1983)), rev'd on other grounds, 536 U.S. 1 (2002).

As described, Respondents cannot satisfy this timeliness requirement. To determine whether an application for intervention is timely, courts in this Circuit examine three factors: "[1] how far the suit has progressed, [2] the prejudice that delay might cause other parties, and [3] the reason for the tardiness in moving to intervene." *Scardelletti*, 265 F.3d at 202-03 (citing *Gould*, 883 F.2d at 286).

An examination of the factors reveals [1] there has been an Order of Default against the party who created the contract and the intervenors, who are not partners, members or otherwise vested with a lawful interest in the entity lack any lawful authority to change that judgment, [2] the intervenors

outright deny any legal liabilities for the conduct of the Defendant and are otherwise unable to supplant them as the party legally liable for the conduct of Defendants, [3] while intervenors knew of the action some two months prior to filing their motion, the record shows they only chose to act at the time for fear the trial court would do something that would affect their propounding another case based on the contract in question. See *Hill v. Western Elec. Co.*, 672 F.2d 381, 386 (4th Cir. 1982) (stating that the most important consideration (in passing on an application for intervention) is whether the delay has prejudiced other parties” (internal quotation marks omitted)). Intervention at that point would likely result in further delay and substantial additional litigation. As the [district] court noted: “If we went to another stage, another degree of complexity it might make it impossible to achieve any settlement at all no matter how, no matter how much it would be in everybody's interest to achieve it.”²

Here, an examination of all three factors weighs against Respondent’s intervention and dictates the court’s denial of both intervention as of right and permissive intervention.

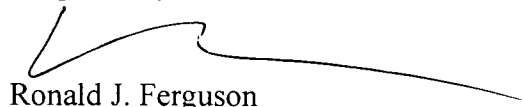
CONCLUSION

Trial courts are guided by precedent and in this case the record not only fails to support the lower court following either [1] *Davis*, a four part test for intervention or [2] *Scardelletti*, three part test for timeliness, but shows intervenors failed to comply with Rule 24 and 5, as well as withheld information of their ex parte conduct with another judge regarding this matter that bears a direct impact on the decision. Clearly, an “error of law” has occurred in granting the order allowing intervenors to proceed in this action, for which they would otherwise be precluded from interfering per *Ex Parte Reichlyn*. The lower court's order granting intervention should be vacated.

² In a demonstration of the U.S. District Court's wisdom we need only look to the intervenors current filings at the trial court level where, following a finding a trial court lacks authority to review another trial court judge's order on the error of law or failure to comply with Rules 24 and 5, that intervenors do not represent Defendants lack authority to vacate the Order of Default, the intervenors now are seeking an order of the matter being dismissed or requiring Plaintiff to name dozens of additional parties to the litigation. No doubt those parties will be thrilled to pay for litigation that is already based on a judge's failure to exercise judgment in accordance with precedent and subject to vacating any result forthcoming.

July 6, 2017

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ronald J. Ferguson", written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify, that on this date, I served a copy of the Petition for Rehearing from Order Dismissing Appeal, dated July 6, 2017 on Respondents Attorney of record by

_____ delivering it to him/her personally; or,

_____ mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows; or,

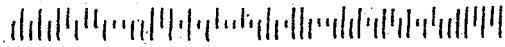
X mailing it to the address indicted by their counsel of record in the Summons as follows:

Rodney M. Brown
210 S Main St
Fountain Inn, SC 29644

This the 7th day of July, 2017.



Ronald J. Ferguson



Ronald Ferguson
103 Mill Creek Road
Piedmont, SC 29673



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