

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Honorable Roger E. Henderson, Circuit Court Judge

Docket No. 2013-CP-17-335

RECEIVED

AUG 09 2017

SC Court of Appeals

Tammy Taylor,

Appellant,

v.

April Springs, Angela Berry, A B Country Kitchen a/k/a A&B Country Kitchen,

Respondents.

RESPONDENT'S INITIAL BRIEF

Alan L. Berry, Jr. #101116
Post Office Box 325
Latta, South Carolina 29565
(843) 418-1155
Attorney for Respondent

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STATEMENT OF ISSUE ON APPEAL

- 1. DID THE TRIAL COURT ERR IN GRANTING THE RESPONDENT'S MOTION TO DISMISS?**

STATEMENT OF THE CASE¹

The Plaintiff initiated this matter by the filing of a Summons and Complaint in the Office of the Clerk of Court for Dillon County on August 27, 2013. The Plaintiff alleges that she fell in a puddle of water leaked from an air conditioner at A & B Country Kitchen. The Defendant filed an Answer on September 25, 2013. In the Answer, the Defendant admitted to being a business as the Plaintiff alleged. The Plaintiff never alleged that the Defendant was a legal entity or a business organized under the laws of South Carolina.

On March 9, 2016, the Defendant filed a Motion to Dismiss pursuant to Rule 12(b)(6) SCRPC. The Motion was heard by Judge Roger Henderson on May 23, 2016. After the hearing, Judge Henderson's law clerk sent an email to the Attorney for the Plaintiff stating in pertinent part, "Judge Henderson is giving you until Friday, June 10th to amend your complaint to include the owner of A B Country Kitchen individually and dba A B Country Kitchen. If you fail to provide Judge Henderson with proof of this amendment on or before June 10th, Mr. Berry's motion to dismiss shall be granted." The Plaintiff amended her Complaint on June 3, 2016, naming new Defendants but not as the Judge's email directed. After the Plaintiff amended the Complaint, Judge Henderson issued a Form 4 denying the Defendant's Motion which was filed in the Office of the Clerk of Court for Dillon County on June 20, 2016.

The Defendant filed a Motion to Reconsider on June 28, 2016, and an Amended Answer on July 18, 2016. The Motion to Reconsider was heard on December 14, 2016. After the

¹ The Respondent respectfully requests that the Court of Appeals adopts its Statement of the Case as the Statement of the Appellant contains certain errors regarding the email from Judge Henderson's law clerk.

hearing, the Court reversed its previous decision and dismissed the Plaintiff's Complaint. The Plaintiff filed a Notice of Appeal on March 6, 2017.

ARGUMENT

STANDARD OF REVIEW

“The trial judge’s discretion will not be disturbed on appeal unless there is a clear showing of abuse of discretion.” *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 163 375 S.E.2d 321, 323 (Ct. App. 1988). An appellant must demonstrate that the trial judge was “controlled by some error of law or where his order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” *Id.*

I. THE TRIAL COURT CORRECTLY GRANTED THE RESPONDENT’S MOTION DISMISSING THE APPELLANT’S COMPLAINT

A. *McCullar v. Estate of Campbell* is applicable to the facts in this case and is controlling law.

“[A]n action brought against a nonexistent defendant is a nullity.” *McCullar v. Estate of Campbell*, 381 S.C. 205, 207 (2009). In *McCullar*, the Supreme Court reviewed an order from the Court of Appeals which reversed a circuit court order dismissing a medical malpractice suit brought against the estate of a deceased doctor after the estate had been closed. In considering the decision of the Court of Appeals, the Court stated that what “is at issue here...is not capacity, standing, or party in interest, but something more fundamental: whether, at the time the suit was

purportedly commenced, there existed a juridical entity...” *McCullar*, 207. The Supreme Court then reversed the Court of Appeals since the estate in question did not exist at the time of the commencement of the suit and “because an action brought against a nonexistent defendant is a nullity.” *Id.*

The Appellant states the following in her brief, “McCullar involved an Estate that no longer existed. This case involves a business that still exists.” Appellant’s Initial Brief, Section II, p. 5. It is correct that the business still operates, but it does not exist and never has existed as a legal entity organized under the laws of the State of South Carolina in the name A & B Country Kitchen. A & B Country Kitchen is a trade name or “d/b/a” under which the owner operates. If the business had incorporated or formed an LLC or any other type of business entity recognized in South Carolina, then it would have been proper to name that entity. That did not happen in this case. Similar to the estate in *McCullar*, the State of South Carolina recognizes an Estate as a legal entity but only when the laws of the State say it is a legal entity. Before an Estate is opened and after it is closed, it is not a juridical entity capable of being sued. A “business” that has not been organized as one of the business entities recognized by the State is also not a juridical entity capable of being sued.

The Trial Court was correct to grant the Defendant’s Motion to Dismiss on grounds that the instant case is a nullity under *McCullar*.

B. Rule 9 (a) does not apply in the instant case.

Rule 9(a) of the South Carolina Rules of Civil Procedure states the following:

It is **not necessary** to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an

organized association of persons that is made a party, **except to the extent required to show the jurisdiction of the court.** When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are within the pleaders' knowledge.

SCRCP 9(a) (emphasis added). In her brief, the Appellant refers to the notion that “[t]he Defendant never raised the issue as a defense in their pleadings or made a specific negative averment as required by the rule.” The rule, however, does not require such “except to the extent required to show the jurisdiction of the court.”

In *McCullar*, the Supreme Court addressed whether the issue of a nonexistent legal entity was a jurisdictional issue or even an issue of a party’s capacity to sue. “The Court of Appeals cited cases holding that the capacity of the parties to sue or be sued is not a question of subject matter jurisdiction. It is true that whether a party is a ‘real party in interest’ is not a matter of subject matter jurisdiction, nor is the issue of a party’s capacity to sue. What is at issue here, however, is not capacity, standing, or party in interest, but something more fundamental: whether at the time the suit was purportedly commenced, there existed a juridical entity...” *McCullar*, 207.

Rule 9 (a) is not applicable to the instant case. Under the rule an averment is only required “to the extent required to show the jurisdiction of the court.” The holding in *McCullar* illustrates that jurisdiction is not a consideration in cases such as this in which there is a lack of a defendant. The Defendant was, therefore, not required to make a specific negative averment to show the jurisdiction of the Court since jurisdiction is irrelevant in this case. The Trial Court was correct to grant the Defendant’s Motion to Dismiss.

C. The admission in the Defendant’s Answer that A & B Country Kitchen is a “business” is not an admission that it is a legal entity nor does it change the fact that the Plaintiff’s action is a nullity.

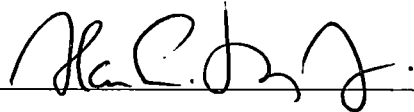
The Appellant correctly points out that the Respondent admitted that A & B Country Kitchen is a business. The Appellant, however, never alleged that the Respondent was a legal entity, nor did any of her pleadings indicate what type of entity it was alleged to be. In fact, A & B Country Kitchen is not a legal entity. Admitting to a bare allegation that the name A & B Country Kitchen is a business was correct but does not confer legal entity status to it. Furthermore, because the instant case was a nullity from its inception, nothing the Defendant could admit or deny would have changed the null and void status of the lawsuit. In *McCullar*, the Supreme Court noted this in their decision stating that the “action was properly ended by the circuit court.” *McCullar*, 208. The footnote to this quote states “We hesitate to say ‘dismissed’ as there was ‘**no action** before the Court...’ to be dismissed. *Id.* (quoting in part from *Commercial & Savings Bank of Lake City v. Ward*, 146 S.C. 77, 143 S.E. 548 (1928)).

The Trial Court was correct to grant the Defendant’s Motion to Dismiss due to the fact that the instant case was a nullity.

CONCLUSION

The Trial Court correctly and properly exercised its discretion in granting the Defendant's Motion to Dismiss. Consequently, the Respondent, A & B Country Kitchen requests that the Court of Appeals deny the appeal and affirm the Trial Court's decision.

August 7, 2017



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PROOF OF SERVICE OF RESPONDENT'S INITIAL BRIEF

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Court of Common Pleas

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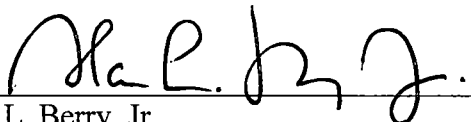
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Respondents.

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal on Tammy Taylor by depositing a copy of it in the United States Mail, postage prepaid, on August 7, 2017, addressed to her attorney of record, Marcus Woodson (Post Office Box 1657, Marion, South Carolina 29571).

August 7, 2017



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August 7, 2017

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SC Court of Appeals

Jenny Abbott Kitchings
Clerk of South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE: Tammy Taylor v. April Springs
Appellate Case No. 2017-000679

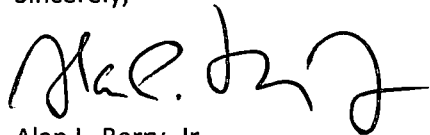
Dear Ms. Kitchings:

In regard to the above referenced case, please find enclosed the original and one (1) copy of the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal and Proof of Service.

By copy of this letter, I am forwarding a copy of the enclosed documents to the Attorney for the Appellant, Marcus Woodson.

If you have any questions, please do not hesitate to contact my office.

Sincerely,



Alan L. Berry, Jr.

djm

Enclosures

cc: Marcus Woodson
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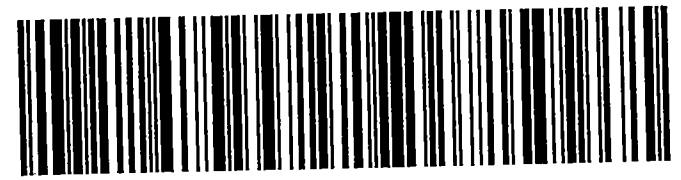
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