

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Hon. J. C. Nicholson, Jr. Circuit Court Judge

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Circuit Court Case No. 2017-CP-10-4112  
S.C. Court of Appeals Case No. 2018-000249

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Chris Khamnei,

Appellant,

v.

Columbus Street Holdings,  
LLC; Roy T. Willey IV and  
Eric M. Poulin, individually,

Respondents.

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**APPELLANT'S REPLY TO  
RESPONDENTS' MOTION TO DISMISS**

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COMES NOW, Chris Khamnei, Appellant, by and through undersigned counsel, and responds to Respondents' Motion to Dismiss the appeal as interlocutory and premature, showing this Court as follows:

**INTRODUCTION**

On September 5, 2017, Appellant filed suit in the Charleston County Court of Common Pleas alleging causes of action against Respondent Columbus Street Holdings, LLC for breach of contract, and against all Respondents for breach of contract accompanied by a fraudulent act.

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On September 13, 2017, Respondents filed a motion for partial dismissal, seeking dismissal of the second cause of action (breach of contract accompanied by a fraudulent act) in its entirety, or in the alternative, dismissal of the individual defendants. Respondents argued that Appellant failed to adequately plead a cause of action for breach of contract accompanied by a fraudulent act pursuant to SCRCP 12(b)(6) and that the individual Respondents could not be personally liable for the actions of the company, and that Appellant failed to adequately plead or advance any theory of “alter ego” or piercing the corporate veil.”

On November 15, 2017, Appellant filed his Memorandum in Opposition to Defendants’ Motion for Partial Dismissal arguing his Complaint properly and thoroughly alleged the elements of breach of contract accompanied by a fraudulent act against all defendants (Respondents), including fraudulent intent on the part of the defendants in breaching the contract.<sup>1</sup> Appellant also argued the specific basis of his claim against the individual Respondents was the legal proposition that members or managers of companies are liable for their own torts, even when acting in a representative capacity, to the extent they would be if acting in an individual capacity. The company is also vicariously liable for the acts of its managers or members.

On December 14, 2017, Judge Nicholson issued an Order granting Respondents’ Motion in part (“Order”). Judge Nicholson declined to dismiss the breach of contract accompanied by a fraudulent act claim against the corporate respondent, but did dismiss the individual Respondents under SCRCP, Rule 12(b)(6), without prejudice, on the basis that Plaintiff/Appellant:

. . . failed to plead facts sufficient to show that Mr. Willey and/or Mr. Poulin acted outside of the scope of their authority, and that they breached the contract accompanied by a fraudulent act.. As an initial matter, the contract is between the Plaintiff and LLC, and neither Mr. Poulin nor Mr. Willey are parties to the contract. There was also no showing that Mr. Willey and/or Mr. Poulin were acting outside the scope of their authority and not on behalf of the corporation. Finally, Plaintiff failed to show that Mr. Willey or Mr. Poulin committed fraudulent intent related to the breach of the contract and a fraudulent act accompanied that breach Harpe, 290 S.C. at 112, 348 S.E.2d at 374. Therefore, based on those reasons this Court dismissed Mr. Willey and Mr. Poulin.

As Respondents have acknowledged in their Motion to Dismiss, at the hearing of

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<sup>1</sup> In addition to pleading the elements of breach of contract accompanied by a fraudulent act, Appellant attached as exhibits to the Complaint e-mail communications between the parties that documented the acts forming the basis of the claim of breach of contract accompanied by a fraudulent act against the company and the individual defendants.

their motion for partial dismissal, Judge Nicholson gave Appellants leave to amend his complaint to add Mr. Willey and Mr. Poulin back in the suit if during the course of discovery he learned of facts showing that Willie and Poulin acted outside the scope of their authority as managers/members of the LLC, or otherwise supported a reason to pierce the corporate veil.<sup>2</sup>

On December 28, 2017, Appellant filed a Motion to Reconsider reiterating that the basis of his claim against the individual defendants were the authorities establishing that individual members and managers are liable for their own torts, even when acting in a representative capacity, and specifically not based on the legal doctrines allowing liability to pass through to members or managers by virtue of the enumerated conditions for piercing the corporate veil, where the individuals would otherwise be shielded from liability.<sup>3</sup> On January 18, 2017, the trial court denied Appellant's motion to reconsider, and this appeal followed.

Respondents have filed a Motion to Dismiss the appeal on the argument that a dismissal of a party from a suit, without prejudice, is interlocutory, and not immediately appealable. However, because the trial court's December 14, 2017 order dismissing the individual defendants has the effect of foreclosing a legal issue, it is immediately appealable, and this Court should deny Respondents' motion to dismiss the appeal as premature.

### **DISCUSSION**

I. The Trial Court's order dismissing the individual defendants has the effect of finally foreclosing a legal issue and is immediately appealable

The granting of a Rule 12(b)(6) motion to dismiss is immediately appealable. Tillman v. Tillman, 420 S.C. 246, 248, 801 S.E.2d 757, 759 (2017). S.C. Code Ann. §14-3-330 (1) allows

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<sup>2</sup> Appellant has ordered and is still awaiting delivery of the transcript of the hearing of Defendants' motion for partial dismissal the order from which underlies this appeal.

<sup>3</sup> Appellant also argued under the South Carolina rules related to 12(b)(6) and the liberal construal of pleadings, he also stated a claim against all respondents for piercing the corporate veil. "Generally, a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons." Hunting v. Elders 359 S.C. 217, 597 S.E.2d 803 (S.C. App. 2004), rehearing denied, certiorari granted, certiorari dismissed.

for the immediate appeal of orders “involving the merits.” An order involves the merits when it finally determine[s] some substantial matter forming the whole or part of some cause of action or defense . . . . Id. (citing Mid-State Distribs. Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 462 S.E.2d 777, 780 (1993)(internal quotation marks omitted). An order which reserves an issues or leaves open the possibility of further action by the trial court before the rights of the parties are resolved, is interlocutory. Tillman, supra, at 248, 759 (citing Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005).

Here, Judge Nicholson’s order purports to dismiss the individual defendants/respondents under Rule 12(b)(6) on the basis that Appellant’s 1) failed to plead facts sufficient to show the individual respondents acted outside the scope of their authority as managers or members and not on behalf of their LLC, and 2) failed to demonstrate that the individual respondents acted with fraudulent intent or committed a fraudulent act relating to the alleged breach of contract. In fact, the order states, “based on these reasons this Court dismisses Mr. Willey and Mr. Poulin.” [Order at p. 3]. The Order then states, “It is therefore, Ordered that Eric M. Poulin and Roy T. Willey, IV, are dismissed without prejudice.” [Order at p. 4].

As stated above, while Judge Nicholson stated orally at the hearing of Respondents’ motion for partial dismissal that his dismissal of the individual defendants was without prejudice, and stated that should Appellant learn of facts through discovery to show that the individual defendants acted or failed to act in a manner consistent with the specific requirements for piercing of the corporate veil, then he had leave to add the individual defendants back into the action. However, that language is not included in the Order. Moreover, even if that language had been included in the Order, it allows Appellant to re-add the individual respondents to the action based on a totally different and independent theory of liability than the one Appellant

pleaded in his Complaint. If the Court's dismissal of the individual respondents without prejudice were based on the failure to plead facts sufficient to state a cause of action against them, it would hardly make sense to dismiss the individual defendants and direct the "parties and the clerk to amend the caption to reflect the dismissal by removing the individuals as named defendants" [Order at p. 4], where Appellant would be allowed to simply amend his complaint to more specifically state the facts supporting his claim.<sup>4</sup>

The Order purports to dismiss the individual respondents without prejudice based on Appellant's failure to state facts to support a claim for piercing the corporate veil. The "without prejudice" aspect purportedly relates to the future discovery of facts to support a claim for piercing the corporate veil. The Order is not finally determined as to its dismissal of the individual defendants based on piercing the corporate veil only. The effect of the Order is a final determination of dismissal based on the well-supported legal theory Appellant pleaded and advanced regarding the individual liability of Respondents for their own torts. Because the effect of the Order seems to foreclose that legal issue, it is final and immediately appealable.

II. Should the Order be construed as granting summary judgment it is immediately appealable.

Judge Nicholson's Order on Respondents' 12(b)(6) motion for partial dismissal appears to consider facts outside the pleadings and improperly makes findings of fact.<sup>5</sup> The Order makes the following findings of fact: 1) "the contract is between the Plaintiff and LLC, and neither Mr. Poulin no Mr. Willey are parties to the contract." [Order at p. 3], 2) "There was also no showing that Mr. Willey and/or Mr. Poulin were acting outside the scope of their authority and not on

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<sup>4</sup> In fact, Appellant stated very specific factual allegations against the individual Respondents related to their conduct constituting dishonest in fact or unfair dealing.

<sup>5</sup> The Order's improper finding of facts on a 12(b)(6) motion to dismiss is one of the grounds for Appellant states for his appeal.

behalf of the corporation.” [Id.], and 3) “Plaintiff failed to show that Mr. Willey or Mr. Poulin committed fraudulent intent related to the breach of contract and a fraudulent act accompanying the breach.” [Id.].

While it is improper to base a 12(b)(6) dismissal on facts outside the pleadings, where any such facts are to be considered, the Court may convert the motion to one for summary judgment. “If on a motion under 12(b)(6) matters outside the pleadings are presented and not excluded, the motion shall be treated as one for summary judgment.” See Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 328, 574 S.E.2d 502, 506 (Ct. App. 2002); McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 489 n. 2, 445 S.E.2d 638, 639 n. 2 (1994). The pertinent portion of Rule 12(b) allowing conversion provides:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion by Rule 56.

Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 328, 574 S.E.2d 502, 506 (Ct. App. 2002).

Here, while the Order reflects the trial court’s consideration of materials outside the pleadings, improper on a 12(b)(6) motion, Respondents’ motion for partial dismissal should not either have been converted to one for summary judgment without allowing the Appellant sufficient notice and opportunity to present all pertinent materials. Furthermore, the trial court does not indicate in its Order that it was converting Respondents’ motion to one for summary judgment. Nevertheless, if the Court’s consideration of such materials outside the pleadings could somehow be construed to have converted the motion to one for summary judgment, without saying as much, then dismissal of the individual respondents under those circumstances

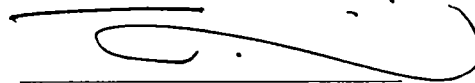
would also be immediately appealable. Generally, orders granting partial summary judgment may be immediately appealable under either the “involving the merits” or “substantial right” categories of section 14-3-330(1) and (2)(c). See Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011); see also Link v. Sch. Dist. of Pickens County, 302 S.C 1, 6, 393 S.E.2d 176, 178-79 (1990) (holding an order granting partial summary judgment may be appealable under either category).

**CONCLUSION**

For the foregoing reasons, Appellant respectfully requests this Court deny Respondents’ Motion to Dismiss his appeal.

Respectfully submitted,

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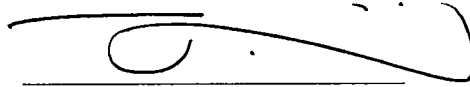
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I certify that I have served the foregoing **Reply to Respondents' Motion to Dismiss** on the Respondents by depositing a copy of it in the U.S. Mail, postage prepaid, on May 10, 2018 addressed to their attorney of record, Stefan B. Feidler, Esq., Anastapoulo Law Firm, LLC, 32 Ann Street, Charleston, SC 29403.

[Signature on following page]

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