

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
The Honorable Paul M. Burch, Circuit Court Judge

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Case No. 2016-CP-40-07109 - Appellate No.: 2018-002054

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Richard A. Finan.....Appellant,

v.

Vista Wings, LLC, d/b/a Wild Wing Café – Columbia .....Respondent.

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MEMORANDUM IN RE APPEALABILITY

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Mark S. Barrow  
Ryan C. Holt  
William H. Yarborough, Jr.  
Sweeny Wingate & Barrow, P.A.  
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Attorneys for Respondent

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Appellant brought various negligence causes of action against Respondent arising from an alleged assault and battery that occurred on Respondent's premises on June 5, 2015. Appellant filed his Complaint on December 1, 2016. On March 20, 2018, Appellant filed a Motion to Amend to add new parties and causes of action. Appellant's Motion was heard and denied on September 6, 2018.

## ARGUMENT

### **I. NO FINAL JUDGMENT HAS BEEN ENTERED AND THE TRIAL COURT'S ORDER DOES NOT AFFECT A SUBSTANTIAL RIGHT**

"South Carolina adheres to the final judgment rule. Accordingly, with certain exceptions, an appeal lies only from a final judgment." *Brunson v. Am. Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (citing *Hagood v. Sommerville*, 362 S.C. 191, 194–195, 607 S.E.2d 707, 708 (2005); S.C.Code Ann. § 14–3–330(1) (1976 and Supp.2004); Rule 72, SCRCPP; Rule 201(a), SCACR. "By statute, an appeal from an interlocutory order is permitted in certain circumstances, including when the order is one 'involving the merits ... [or] affecting a substantial right.'" *Id.* (quoting S.C.Code Ann. § 14–3–330(1)–(2)). "An order affects a substantial right and is immediately appealable when it '(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action[.]'" *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) (quoting Section 14–3–330(2)). "An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed." *Id.* (citing *Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct.App.2002)).

Furthermore, the question presented to the parties has been directly addressed previously. In *Tillman v. Tillman*, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017), the South Carolina Court of Appeals dismissed an appeal following a denial of a motion to amend, stating that “[i]n the unlikely event the motion to amend is denied, then Appellant retains the right, after the lawsuit ends, to appeal the denial along with the dismissal of his counterclaims.” (internal citations omitted).

No final judgment has been entered in this matter. In fact, the only event preventing such a final judgment is the present appeal. Like *Tillman*, Appellant retains the right to appeal such denial following a final determination of the matter.

## **II. EVEN IF THE ISSUE IS IMMEDIATELY APPEALABLE, IT IS MOOT AND THE APPEAL SHOULD BE DISMISSED**

Appellant’s Amended Complaint would be futile upon filing. Futility of amendment may serve to prevent such an amendment. *See, e.g., Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d, 252, 262 (2017). The underlying matter is a premises liability action; as such, the three-year statute of limitations found in S.C. Code Ann. § 15-3-530 controls. The incident in question occurred on June 5, 2015. Therefore, the statute of limitations has passed and Appellant may not amend his Complaint to join additional parties and skirt this barrier. *See, e.g., Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000). Even if the trial court took the unprecedented step of considering a proposed amended summons and complaint filed as an exhibit to a motion prior to obtaining the required leave from the court to amend to satisfy the filing requirement under Rule 3(a), SCRCP, Appellant failed to satisfy Rule 3(a)(1)–(2). Namely, Appellant did not serve the newly named parties within the statute of limitations running or within 120 days of “filing”. As a result of the foregoing, any amended complaint is

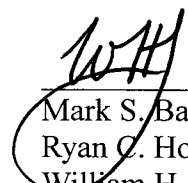
futile because the claims which Appellant seeks to assert are time-barred and the present appeal is moot.

**CONCLUSION**

The appeal before this Honorable Court is not proper as it is interlocutory pursuant to *Tillman* and moot. For these reasons, Respondent respectfully requests the Court dismiss the appeal.

Respectfully submitted,

December 28, 2018

  
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Richard A. Finan .....Appellant,

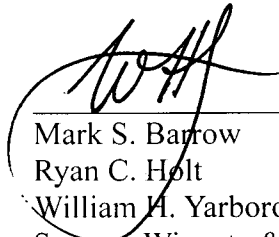
v.

Vista Wings, LLC, d/b/a Wild Wing Café – Columbia .....Respondent.

**PROOF OF SERVICE**

I certify that I have served the Memorandum in Re Appealability on Appellant, Richard A. Finan, by depositing a copy of the same in the United States Mail, Postage Prepaid, on December 28, 2018, addressed to his attorneys of record; Jenkins M. Mann, Esquire and Shaun C. Blake, Esquire, P.O. Box 11803, Columbia, South Carolina 29211.

December 28, 2018

  
\_\_\_\_\_  
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## SWEENY WINGATE & BARROW P.A.

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Reply to: Main Office

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**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

RE: Richard A. Finan v. Vista Wings, LLC d/b/a Wild Wing Cafe - Columbia, Brent  
Weston, and Aaron Miller  
Civil Action No.: 2016CP4007109/Appellate #2018-002054  
Our File: 1395-10793

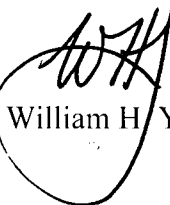
Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of Respondent's Memorandum in Re Appealability in the above-referenced matter. Please stamp and return a copy of the Memorandum and one copy of the Proof of Service to our courier. By copy of this correspondence with enclosures, opposing counsel is served with same.

Thank you for your assistance and should you have any questions or concerns, please do not hesitate to contact me directly.

Yours truly,

**SWEENY, WINGATE & BARROW, P.A.**



William H. Yarborough, Jr.

WHY/smt  
Enclosures

cc: Jenkins M. Mann, Esquire, Rogers Lewis Jackson Mann Quinn, LLC  
Shaun C. Blake, Esquire, Rogers Lewis Jackson Mann & Quinn, LLC