IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Case No. 2017-CP-10-5140

JOHN DANIEL MEYERS, JR.....Respondent,

v.

TRIPLE STAR, LLC, d/b/a STARS ROOFTOP
BAR AND GRILL ROOM, ...Appellant.

RESPONDENT'S REPLY

Trip Riesen (S.C. Bar #: 71084)
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Attorney for Respondent

Dated: January 24, 2019

OTHER COUNSEL OF RECORD:

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Attorney for Defendant Motivated Marketing, LLC

Respondent, pursuant to Rule 240 of the South Carolina Appellate Court Rules, files this Reply to Appellant's Return and respectfully requests that this Court grant Respondent's Motion to Dismiss.

BACKGROUND[1]

ARGUMENT

A. The Order Did Not Strike and Dismiss the Statutory Employer Defense Precluding the Defense from Raising the Issue Again at Trial.

Appellant asserts that *by its express terms* Judge Miller's circuit court order constituted a full and final disposition of Appellant's statutory employee defense, striking and dismissing the affirmative defense, and precluding Appellant from raising the defense at trial. This statement simply is not true. Nowhere in Judge Miller's order is there any reference to striking and dismissing any affirmative defense whatsoever. Additionally, there is absolutely no mention in the order representing "full and final disposition" or anything barring the appellant from raising this issue again. Rather, the order discusses the parties' respective positions along with the evidence in the record and based on that information Judge Miller ultimately decided to deny Appellant's 12(b)(1) Motion to Dismiss.

Appellant relies on *Glass v. Dow Chem. Co.*, 325 SC 198, 482 S.E.2d 49 (1997). However, *Glass* involved cross motions, one of which **Plaintiff sought to strike the statutory employee defense from Dow's answers**. In *Glass*, the trial court specifically struck and dismissed the statutory employee defense finally determining the issue. Conversely, this case did not involve cross claims. Neither party requested or filed a motion to strike which, if applicable, should have been brought pursuant to Rule 12(f)

[1] See Respondent's Motion to Dismiss, p. 1.

SCRCP. Instead, Appellant is the party who chose to file a 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction. As such, our facts are materially different. Consequently, there has been neither a motion to strike nor a final disposition of Appellant's statutory employee defense precluding Appellant from raising the defense at trial.

B. The Order Denying Appellant's 12(b)(1) Motion to Dismiss Alleging the Statutory Employer Defense Does Not Fall Within One of the Several Categories of Appealable Orders in S.C. Code §14-3-330, and, thus, is interlocutory and not Immediately Appealable

Appellant's appeal of the order denying its motion to dismiss for lack of subject matter jurisdiction pursuant to 12(b)(1) is not immediately appealable and accordingly should be dismissed. *Deskins v. Boltin*, 319 S.C. 356, 357, 461 S.E.2d 395; *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995), overruled on other grounds by *Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002).

In *Deskins*, which was decided after *Glass*, the Supreme Court was faced with the same issue here where immediate appeal was taken to overturn a lower court's denial of a 12(b)(1) motion to dismiss on the grounds that the action was barred by the exclusivity provision of the Workers Compensation Act. 319 S.C. at 357, 461 S.E.2d 395. The Supreme Court reiterated its then recent holding in *Woodard* "that the denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable." 319 S.C. at 242-43, 360 S.E.2d at 394.

Our Supreme Court consistently holds that an order denying a motion to dismiss under Rule 12(b)(1) is interlocutory, does not fall within one of the several categories of appealable orders in S.C. Code §14-3-330, and, thus, is not immediately appealable. E.g.

Deskins, 319 S.C. at 357, 461 S.E.2d 395; *Woodard*, 319 S.C.at 242-43, 460 S.E.2d at 393-94. As explained by our Supreme Court:

> An order denying a motion to dismiss for lack of subject matter jurisdiction does not finally determine anything. See *McLendon v. South Carolina Dep't of Highways and Pub. Transp.*, 313 S.C. 525, 443 S.E.2d 539 (1994) (like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage in the proceedings). Consequently, while such orders may involve a substantial right, they do not fall under § 14-3-330(2)(a) because they do not in effect determine the action and prevent a judgment from which an appeal might be taken or discontinue the action. For the same reason, such orders do not "involve the merits" under § 14-3-330(1). See *Mid-State Distributors v. Century Importers*, 310 S.C. 330, 426 S.E.2d 777 (1993) (for an order to "involve the merits" as that term is used in § 14-3-330, it must *finally determine* some substantial matter forming the whole or a part of some cause of action or defense.

Woodard, 319 S.C. at 242-43 [FN 2], 460 S.E.2d at 393-94; see also *Cooke v. Palmetto Health Alliance*, 367, S.C. 167, 173-74, 624 S.E.2d 439, 442 (Ct. App. 2005) (reiterating that denial of a 12(b)(1) motion is not immediately appealable but where the parties **consented** to a non-jury hearing on the merits of the exclusivity defense that resulted in a **final determination** by trial court, the determination was appealable. Further, in *Cooke* counsel for both parties represented to the circuit court, "this is not a motion...we're here today on the merits...we decided to tee this issue up before we go further in the case." *Cooke* at 170-71. Finally, in *Hagood v. Sommerville* our Supreme Court has emphasized that section 14-3-330(2) has "been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed." 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005).

C. Dismissing the Appeal will Allow Case to Continue with Ongoing Discovery and Mediation

This case involves multiple defendants and discovery is still ongoing. Respondent has noticed several depositions, which Appellant has objected to because it has appealed this issue. Appellant asserts the Court of Appeals retains jurisdiction over the case pursuant to Rule 251 SCACR and thus the case is on hold and discovery should be held in abeyance.

Moreover, mediation with all parties involved has been scheduled for March 7, 2018. Appellant concludes in its Return, Appellant welcomes the opportunity to relitigate the issue of statutory employee defense should this Court determine that the issue has not yet finally been decided on the merits. Respondent believes that judicial economy would be best served if the case were allowed to proceed with ongoing discovery and mediation, which ultimately may resolve the issue at hand. If the case does not resolve, Appellant can raise this issue at trial and request a final determination on the merits. Upon a final determination ruling on the merits by the circuit court judge, the issue then would be immediately appealable.

CONCLUSION

For the foregoing reasons, Appellant is not entitled to appeal of the lower court's denial of its Motion to Dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), SCRCP, on the ground that the exclusivity provision of the Workers' Compensation Act bars the civil claims against it. As such, Respondent's Motion to Dismiss should be GRANTED and the appeal dismissed.

Respectfully submitted,

Trip Riesen (S.C. Bar #: 71084)
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Attorney for Respondent

Dated: January 24, 2019

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PROOF OF SERVICE

I certify that I have served the Respondent's Motion to Dismiss upon all counsel of record by depositing a copy of same in the United States Mail, First Class postage prepaid, on January 24, 2019, addressed to all attorneys of record, addressed as follows:

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January 24, 2019

VIA US FIRST CLASS MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: **John Daniel Meyers, Jr. v. Triple Star, LLC, et al**
In the Charleston County Court of Common Pleas
Case No. 2017-CP-10-5140

Dear Ms. Kitchings,

With regards to the above referenced matter, please find enclosed for filing the following:

1. Respondent's Reply
2. Proof of Service of Respondent's Reply

I have also included an extra copy of the Respondent's Reply with Proof of Service and would appreciate your returning these filed copies to our office in the enclosed self-addressed stamped envelope.

Thank you for your assistance in this matter. If you have any questions or concerns, please do not hesitate to contact me.

Very Truly Yours,

Trip Riesen

Enclosures as stated

cc: Joseph D. Thompson, III, Esq.
Elizabeth F. Fulton, Esq.
Christopher Nickels, Esq.
Edward K. Pritchard, III, Esq.

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