THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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SC Court of Appeals

Case No. 2018-CP-40-01434

Southeast Payphone Group, Inc., a
South Carolina Corporation Appellant,

v.

Water Flow Business Brokers, LLC, a
South Carolina Limited Liability Company,
and Ryan Cannon, Defendants,

Of Whom Ryan Cannon is the, Respondent.

FINAL REPLY BRIEF OF APPELLANT

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Regrettably (and candidly, embarrassingly), Respondent is correct that Appellant failed to recognize that one of the cases upon which it relied – specifically, 16 Jade St., LLC v. R. Design Constr. Co., LLC, 398 S.C. 338, 728 S.E.2d 448 (2012) – was withdrawn and substituted. See 16 Jade St., LLC v. R. Design Constr. Co., LLC, 405 S.C. 384, 747 S.E.2d 770 (2013). Appellant's counsel certainly regrets this oversight.[1]

That said, although the Supreme Court saved for another day the discussion of whether the Uniform Limited Liability Company Act shields an LLC member for personal liability for his own torts, id. at 405 S.C. 386, 747 S.E.2d at 771, Appellant contends the Supreme Court's analysis in its initial opinion nevertheless was correct. Specifically, two of the components of the Supreme Court's analysis were items the Court could not withdraw, substitute, or otherwise change – namely, the General Assembly's comments in the very statute Respondent and the trial court relied upon in moving for and granting, respectively, Respondent's motion to dismiss: S.C. Code Ann. § 33-44-303. See 16 Jade St., 398 S.C. at 347, 728 S.E.2d at 453, nn. 8 and 9.

The first comment to Section 33-44-303 provides as follows:

> A member or manager, as an agent of the company, is not liable for the debts, obligations, and liabilities of the company simply because of the agency. ***A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity.***

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[1] While the Supreme Court withdrew the previous opinion, it did not reverse or overrule its analysis regarding personal liability of an LLC member; rather, the Supreme Court simply held that the LLC member in question did not owe any duty to the plaintiff and, thus, had committed no actionable tort such that its personal liability analysis was necessary.

S.C. Code § 33-44-303, cmt. (emphasis added). As noted by the Supreme Court, "[w]e believe this is evidence of the General Assembly's intent that he should be liable for his torts." 16 Jade St., 398 S.C. at 347, 728 S.E.2d at 453, n. 8.

Next, the Supreme Court noted that "[t]hese comments similarly note that ***nothing in the current version of the provision under scrutiny in this case [§ 33-44-303] was intended to ameliorate the common law principle that a tortfeasor is always responsible for his own tortious conduct***." Id., n. 9, citing Revised Uniform Limited Liability Company Act § 304 cmt. ("This paragraph shields members and managers only against the debts, obligations and liabilities of the limited liability company and is irrelevant to claims seeking to hold a member or manager directly liable on account of the member's or manager's own conduct.") (emphasis added).

Thus, while the Supreme Court withdrew its initial opinion in 16 Jade St., the comments to Section 33-44-303 speak to legislative intent and make it abundantly clear that a member of an LLC can be personally liable for his own tortious conduct. As such, Appellant's allegations of tortious conduct by Respondent were sufficient to survive Respondent's motion to dismiss.

Next, Respondent continues to argue that because Appellant alleged in its Complaint that "[t]he actions of [Respondent] are also imputed to Water Flow under the doctrine of *respondeat superior*," there can be no personal liability against Respondent. (R. p. 9, ¶ 37). This is not an accurate statement of the doctrine of *respondeat superior*; rather, as in this case, the allegations against Respondent, in his personal capacity, are alleged to be imputed to Water Flow as additional grounds for liability against Water Flow. In other words, the allegations set forth in ¶37 do not absolve Respondent of liability for his own tortious conduct, but rather, to allege the liability of both Respondent and Water Flow for the acts and omissions of Respondent. See, e.g., Collins v. Johnson, 242 S.C. 112, 122-23, 130 S.E.2d 185, 190 (1963) ("We have held that the identification

of master and servant is so complete that a joint action is maintainable against the two, even though liability of the master rests upon the principle of respondeat superior. Where a servant is guilty of negligence or willfulness while acting for a master within the scope of his employment, the liability is joint and several.").

Thus, regardless of whether Respondent was acting in a representative capacity as an officer and agent for Water Flow, a cause of action is maintainable against both. Therefore, the trial court erred in dismissing Respondent on the grounds he could not be personally liable for damages for his actions as an agent of Water Flow. To the contrary, as alleged and contended by Appellant, both Respondent and Water Flow can be liable for the actions of Respondent.

CONCLUSION

As argued in Appellant's brief and reply, Respondent is not protected from personal liability simply because he is a member of Water Flow. Stated differently, just because Respondent is a member of Water Flow does not insulate him personal liability for his actions. Appellant alleged facts sufficient to justify personal liability against Respondent, and the trial court's Order dismissing Respondent should be reversed.

Respectfully submitted,

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