

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2016-CP-40-07109

RECEIVED
DEC 06 2019
SC Court of Appeals

Richard A. Finan,Appellant,

v.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO PERFORM ANY ANALYSIS UNDER RULE 15, SCRPC AND REFUSING TO ALLOW PLAINTIFF TO ADD DEFENDANTS TO THE COMPLAINT WHEN THE MOTION TO ADD DEFENDANTS WAS PROMPTLY FILED ONE (1) WEEK AFTER PLAINTIFF WAS ABLE TO DETERMINE, AFTER A YEAR OF DISCOVERY DISPUTES, A RULE 11 BASIS TO NAME THOSE PARTIES, AND THE ONLY POSSIBILITY OF PREJUDICE WAS TO PLAINTIFF IN THE EVENT OF THE MOTION TO ADD DEFENDANT'S DENIAL?

STATEMENT OF THE CASE

Appellant (“Mr. Finan”) filed suit against Respondent (“Vista Wings”) in Richland County on December 6, 2016. (**Summons and Complaint.**) As detailed below, discovery was served on Vista Wings with this Complaint. Vista Wings answered the Complaint on January 27, 2017. (**Answer of Vista Wings.**) On March 1, 2018, two (2) settled defendants were dismissed by stipulation. (**Filed Stipulation of Dismissal.**) On March 20, 2018, following a number of discovery disputes detailed below, Mr. Finan moved to amend the Complaint to remove the settled defendants from the caption and add newly identified defendants to the lawsuit: Aetius Restaurant Group, LLC; Aetius Franchising, LLC; Aetius Holdings, LLC (the “Aetius Companies”)¹. (**Motion to Amend Complaint dated March 20, 2018, hereinafter “Motion to Add Defendants”.**)

The trial court received oral arguments on the Motion to Add Defendants on September 6, 2018. On September 7, 2018, the trial court denied the Motion to Add Defendants. (**Order dated September 7, 2018.**) On September 13, 2018, Defendant timely filed a motion asking the trial court to reconsider, alter or amend the September 7, 2019 Order. (**Motion to Reconsider, Alter, and Amend Order Denying Plaintiff’s Motion to Amend the Complaint, hereinafter “Motion for Reconsideration.”**) The trial court denied Finan’s Motion for Reconsideration on October 17, 2018. (**Order dated October 17, 2019.**)

On November 16, 2018 timely filed and served his Notice of Appeal regarding the Orders dated September 7, 2018, and October 17, 2018 (collectively hereafter, the “Orders”). On

¹ Notably, Axum Capital Partners, LLC, Axum Capital Partners Management, LLC, Craig Hepfner and Santana Griffin were also initially requested to be added in the Motion to Add Defendants, but Mr. Finan withdrew this request at the hearing in good faith after receiving supplemental discovery from Vista Wings.

December 20, 2018 the Clerk of Court issued a letter requesting that the parties all submit a memorandum addressing the issue of appealability within ten (10) days of the date of the letter. The parties timely submitted memoranda in response to the Clerk’s inquiry. On February 28, 2019, and without a hearing, this court entered an Order dismissing this appeal holding that the circuit court orders preventing him from amending the Complaint to add Defendants to this case is not immediately appealable. Finan received the Order on March 4, 2019, and he timely filed a Petition for Rehearing. On November 8, 2019, the Court granted Finan’s Petition and reinstated this appeal.

STANDARD OF REVIEW

While the South Carolina Supreme Court has “consistently held that a circuit court’s ruling on a Rule 15 motion to amend is within its discretion,⁸ a court’s failure to exercise its discretion is itself an abuse of discretion. Patton v. Miller, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017), *reh’g denied* (Sept. 27, 2017).

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO APPLY THE STANDARD OF RULE 15 AND BASELESSLY DENYING MR. FINAN’S TIMELY MOTION TO ADD DEFENDANTS.

A. Legal standard governing Plaintiff’s Motion to Add Defendants.

The South Carolina Supreme Court has held: “[A]n order depriving a plaintiff of his or her ability to determine the defendant against whom he or she brings a cause of action can affect a substantial right, making the order immediately appealable.” Dorn v. Cohen, 418 S.C. 126, 137–38, 791 S.E.2d 313, 319 (Ct.App.2016), *reh’g denied* (Oct. 27, 2016), *aff’d as modified*, 421 S.C. 517, 809 S.E.2d 53 (2017) (citing Morrow v. Fundamental Long–Term Care Holdings, LLC, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015) (“The effect of this order is to prevent the [plaintiffs] from being architects of their own complaint, and deprives them of bringing their case against the

defendant of their own choosing.”); Neeltec Enters., Inc. v. Long, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) (“The right of the plaintiff to choose [his] defendant is a substantial right within the meaning of this subsection.”).

The South Carolina Supreme Court has recently discussed the application of Rule 15, SCRCP. Patton v. Miller, 420 S.C. 471, 804 S.E.2d 252 (2017), reh'g denied (Sept. 27, 2017). The South Carolina Supreme Court stated:

Rule 15(a) provides that when a party asks to amend his pleading, “leave shall be freely given when justice so requires and does not prejudice any other party.” Rule 15(a), SCRCP. “This rule strongly favors amendments and the court is encouraged to freely grant leave to amend.” Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005) (citing Jarrell v. Seaboard Sys. R.R., Inc., 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987)). “Rule 15(a) is substantially the same as the Federal Rule,” Rule 15(a), SCRCP notes, and the Supreme Court of the United States has referred to the Rule's “freely given” provision as a “mandate” that “is to be heeded,” Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962). The Foman Court continued: “If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’” Id. (citing Fed. R. Civ.

P. 15(a)); *accord* Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988).

Patton, 420 S.C. at 489–90, 804 S.E.2d at 261–62. The Supreme Court has further made it clear that “Rule 15 prejudice is some result flowing from the amendment that puts the non-moving party at a disadvantage in defending the merits, which disadvantage the party would not have faced if the amended claim had been included in the original pleading or a timely motion to amend. Patton, 420 S.C. at 491, 804 S.E.2d at 262–63 (emphasis added).

The only analysis performed by the trial court in denying the Motion is as follows: “Plaintiff’s proposed amendment adds unnecessary complication one month prior to the trial date. As a result, Defendant would be prejudiced if the Court ere to grant Plaintiff’s amendment.” This analysis represents a complete disregard for the analysis required by the Supreme Court in Patton.

B. Events demonstrating Mr. Finan’s Motion to Add Defendants was timely.

1. The Allegations of the current Complaint.

On the night of June 5, 2015, Mr. Finan was a patron and invitee at the Defendant Vista Wings’ restaurant, Wild Wing Café, located on Lady Street in Columbia, South Carolina. On that evening, Vista Wings was hosting a concert featuring the Ricky Young Band (the “Event”). According to witnesses, Mr. Finan was violently assaulted during the Event by a group of individuals who were intoxicated at the premises in violation of S.C. Code Ann. § 61-4-580 and S.C. Code Ann. § 61-6-2220. (**Motion for Reconsideration Ex. 1, *Police Report*; Motion for Reconsideration, Ex. 2, *Excerpts from Deposition of Chris Seiple*.**) Mr. Finan sued Vista Wing’s for overserving alcohol during the Event; failing to properly provide trained security, servers, and managers during the Event; and failing to properly manage and supervise its employees and staff during the Event. As a result of Vista Wing’s negligence and failure to secure its premises, Vista

Wing's intoxicated patrons held Mr. Finan in a defenseless posture, strangled him to point he and others feared his death, and savagely, repeatedly beat him, fracturing his orbital, and scaring his face. (**Motion for Reconsideration Ex. 3**, *Excerpts from Deposition of Joni Williamson*; **Motion for Reconsideration, Ex. 4**, *Excerpts from Deposition of Richard Finan*; **Motion for Reconsideration, Ex. 5**, *Photos of Richard Finan*; **Motion for Reconsideration, Ex. 6**, *CENTA Medical Group records for Mr. Finan*.) Accordingly, Mr. Finan's Complaint against Vista Wings, bringing claims of negligence (including negligent hiring, training, retention, and supervision of employees), premises liability, and dram shop liability.

2. Mr. Finan's Frustrated Effort to Conduct Discovery.

On December 6, 2016, together with the Complaint initiating this action, Mr. Finan served his initial written discovery under Rules 33 and 34, SCRCF, on Vista Wings. (**Motion for Reconsideration, Ex. 7**, *Plaintiff's First Set of Interrogatories to Vista Wings*; **Motion for Reconsideration, Ex. 8**, *Plaintiff's First Set of Requests for Production to Vista Wings*; **Motion for Reconsideration, Ex. 9**, *Affidavit of Service*.) These requests, in part, were designed to identify whether there were other corporate entities, such as the Aetius Companies, that needed to be added as a party to the case based on the allegations in the Complaint.

On March 6, 2017, Mr. Finan was required to file his first Motion to Compel discovery from Vista Wings ("First Motion to Compel") because Vista Wings had failed to provide any response to Mr. Finan's first discovery requests. (**First Motion to Compel dated March 6, 2017**.) In response, Vista Wings provided its initial responses to Mr. Finan's first discovery requests. (**Motion for Reconsideration, Ex. 10**, *Vista Wing's initial discovery responses*.) These responses were made in a manner as to obfuscate the role of the Aetius Companies to the allegations of the Complaint. For example:

- In response to interrogatory #1, Vista Wings filed to identify the corporate entities that were actually involved in the facts of this case and would testify through representative witnesses, which in turn hid from Mr. Finan the relationships, sought in Interrogatory #18, between the Aetius Companies, and both Vista Wings and the natural persons involved in or performing the acts and omissions detailed in the Complaint.
- In response to Interrogatory #7, Vista Wings did not identify the role that the Aetius Companies had in employing the persons and taking actions attributed to Vista Wings in the Complaint.
- In response to Interrogatory #8, Vista Wings refused to identify those persons or entities that held the membership interest of Vista Wings intentionally hiding the identity of and relationship between it and the Aetius Companies.

Vista Wings supplemented its responses to Mr. Finan's First Set of Requests for Production on March 15, 2017. (**Motion for Reconsideration, Ex. 11, Certificate of Service for Vista Wings' Supplemental Responses to Plaintiff's Requests for Production.**) However, it did not correct these misleading responses or omissions.

On June 21, 2017, following a hearing on the First Motion to Compel, the trial court issued a Form 4 Order requiring Vista Wings to produce records to Mr. Finan relating to the Wild Wing Café location where the event occurred. (**Form 4 Order dated June 21, 2017.**) However, on July 13, 2017, Mr. Finan was forced to file a Rule to Show Cause and Motion to Compel ("Second Motion to Compel") regarding Vista Wing's failure to respond to Mr. Finan's Interrogatories and Requests for Production. (**Second Motion to Compel dated July 13, 2017.**)

On September 11, 2017, and in response to the Second Motion to Compel, Vista Wings served its Supplemental Answer to Mr. Finan's First Set of Interrogatories, its Second Supplement

to Mr. Finan's Request for Production, and a belated verification of its Interrogatory responses. (**Motion for Reconsideration, Ex. 12.**) The Verification was completed by Andy Johnson, who identified himself under oath as the Chief Financial Officer of Vista Wings. As discussed below, counsel for Vista Wings subsequently informed the trial court on March 2, 2018, that he is not the CFO for Vista Wings, but rather the CFO for one of the Aetius Companies.

On September 21, 2017, and in response to the Second Motion to Compel, Vista Wings again served Supplemental Answers to Plaintiff's First Set of Interrogatories and First Set of Requests for Production. (**Motion for Reconsideration, Ex. 13.**)

On November 1, 2017, nearly a month after another Rule 11 letter dated October 6, 2017, due to Vista Wings ignoring outstanding discovery (**Motion for Reconsideration, Ex. 14**), Vista Wings served its belated answers to Mr. Finan's Second Interrogatories, Third Requests for Production, and Fourth Request for Production. (**Motion for Reconsideration, Ex. 15**, *Letter dated November 1, 2017, discussing Vista Wing's responses to Plaintiff's Second Set of Interrogatories, Third Requests for Production, and Fourth Requests for Production.*)

In response, Mr. Finan promptly served subpoena on the Aetius Companies on November 14, 2017, in order to determine the level of involvement of these legal entities with the allegations at issue in this case and discover the records in their possession regarding the same. (**Motion for Reconsideration, Ex. 16**, *November 2017 Subpoenas to Aetius Companies.*) Rather than cooperate with the subpoenas, the Aetius Companies utilized their purported subsidiary, Vista Wings, to move to quash the subpoenas on November 20, 2017. (**Motion to Quash filed November 20, 2017.**)

Therefore, on November 22, 2017, Mr. Finan was required to file another Motion to Compel discovery disclosures ("Third Motion to Compel") from Vista Wings in order to obtain

discovery sought, including (a) the identification of the members of Vista Wings; (b) the identification of those who hired, trained, and supervised bartenders and security personnel working during the event and those persons' qualifications; and (c) employment records. All of this information had been sought since the very initiation of the lawsuit. (**Third Motion to Compel dated November 22, 2017.**)

Likewise, on December 14, 2017, Mr. Finan was required to file a Motion to Compel Subpoena Responses and Rule to Show Cause in order to discover the responses from the Aetius Companies. (**Motion to Compel Subpoena Responses dated December 13, 2017.**)

On March 2, 2018, Judge Benjamin heard oral argument on Mr. Finan's Third Motion to Compel and Motion to Compel Subpoena Responses and Rule to Show Cause, as well as Vista Wings's Motion to Quash. (**Motion for Reconsideration, Ex. 17, Transcript from hearing on March 2, 2018.**) During that hearing, Mr. Finan's counsel argued that it needed cooperation from Vista Wings and the Aetius Companies in discovery so that Mr. Finan could learn of the operational involvement of the Aetius Companies and their role in the allegations of the Complaint. (**Id., p. 11, l. 13 – p. 12, l. 24.**)

During the hearing, Judge Benjamin requested that Mr. Finan's counsel prepare an order granting the Motion to Compel Subpoena Responses and Rule to Show Cause, attaching revised subpoenas that allowed the Aetius Companies twenty (20) days to respond. (**Id., p. 41, l. 4 – p. 42, l. 2.**) In response to the Motion to Compel, Judge Benjamin likewise requested that Mr. Finan's counsel prepare an order requiring Vista Wings and the Aetius Companies to provide employment records. (**Id., p. 43, l. 5-18.**)

Also during the hearing on March 2, 2018, counsel for Vista Wings indicated that some of the witnesses identified as being involved in planning and scheduling the concert event at issue

have not “worked in the store” and that he did not “know who they are or how they’re involved.” (*Id.*, p. 47, l. 19 – p. 48, l. 14.) Counsel for Vista Wings indicated for the first time to the court that Andy Johnson (who previously stated under oath in the verification of Vista Wing’s discovery responses that he was the Chief Financial Officer of Vista Wings) was in fact not the CFO of Vista Wings, but rather the CFO of “one” of the Aetius Companies. *Id.* p. 48, l. 24 – p. 53, l. 2.

Not wanting to delay depositions of the Vista Wings’ witnesses further and trusting that additional discovery production would be forthcoming following the hearing on March 2, 2018, Plaintiff deposed witness Brian Neal on March 13, 2018. (**Motion for Reconsideration, Ex. 18, Deposition of Brian Neal.**) Additional Vista Wings depositions were scheduled to be taken then, but for personal reasons of a witness, were cancelled the day of the deposition. During this deposition, Mr. Neal, the general manager of the Wild Wing Café location at issue, disclosed information to Mr. Finan that demonstrated the need to add the Aetius Companies as defendants to the lawsuit. For example, Mr. Neal disclosed the following:

- Mr. Neal stated that his actual employer was the “corporate office” in Charlotte, North Carolina, and that is where his “bosses” work, as well as his “CEOs,” “CFOs” “Regional Managers” and “marketing department” work [*Id.* p. 13, l. 23 – p. 15, l. 12];
- The training decisions for the “front of the house” employees involved in the allegations of the Complaint were made by the “home office,” not the local operating company, Vista Wings [*Id.* p. 31, l. 6 – p. 32, l. 14; p. 34, ll. 9-18; p. 107, l. 17 – p. 108, l. 6; p. 108, ll. 20-22];
- The employment and training of the managers in the various Wild Wing locations was “handled by the “home office” and “corporate trainers.” [*Id.* p. 46, l. 13– p. 47, l. 23; p. 119, ll. 6-20; p. 122, l. 16 – p. 123, l. 10];

- The “corporate office” is responsible for the software that tracks staffing ratios, labor costs to sales ratios, and alcohol service used at the Wild Wing Café in the Vista [Id. p. 64, l. 6 – p. 65, l. 11];
- One of the executives in Charlotte tracks puts together a weekly “ranking report” to increase competition between the various operating companies in terms of sales, cost of labor, etc. [Id. p. 73, l. 6 – p. 74, l. 8];
- The corporate office moves employees and managers from operation to operation in order to improve performance at difference companies [Id. p. 74, l. 9 – p. 76, l. 12];
- The “home office” maintains all of the financial records for Vista Wings and is the only one knowledgeable about its financial performance [Id. p. 128, l. 13 – p. 129, l. 1; p. 149, ll. 10-16];
- The “home office” pays the bands, such as the band on duty for the concert event that is the issue of this lawsuit [Id. p. 134, l. 21 – p. 135, l. 13];
- The “home office” instructs Vista Wings’s managers and employees when to spend their internal meetings, called “ally rallies,” discussing and hyping concert events like the one at issue in this lawsuit [Id. p. 139, ll. 7-17];
- The “corporate office” propagates training manuals for use by the staff of Vista Wings [Id. p. 199, ll. 6-11];
- The “corporate office” pays for promos offered by Vista Wings [Id. p. 164, ll. 6-11];
- The “corporate” parent dictates the budget and financial targets of Vista Wings [Id. p. 199, l. 1 – p. 200, l. 13]; and
- the “corporate” human resource department is often involved in decisions to terminate Vista Wing’s employees [Id. p. 113, l. 2 - p. 155, l. 20.]

However, Mr. Neal is not able to identify which of the Aetius Companies performs any or all of these operational roles for the Wild Wing Café in the located in the Vista that is at issue in this case. (**Id. p. 21 l. 15 – p. 22, l. 7.**)

3. Mr. Finan’s Motion to Add Defendants

Promptly seven (7) days following the deposition of Brian Neal, Mr. Finan filed the Motion to Amend his lawsuit that is the subject of this motion. (**Motion to Amend dated March 20, 2018, with Exhibits.**) Simultaneously, after conferring with counsel for Vista Wings and the Aetius Companies on the form of the Order, Mr. Finan’s counsel submitted a proposed order to Judge Jefferson on March 20, 2018. (**Motion for Reconsideration, Ex. 19, Proposed Order.**)

Vista Wings and the Aetius Companies continued to oppose the form of the Order after additional changes were made to it; therefore, Judge Benjamin requested a copy of the transcript be provided to her by the parties. This copy was obtained and immediately forwarded to Judge Benjamin on May 24, 2018. (Motion for Reconsideration, Ex. 20, *Email with Judge Benjamin’s Chambers.*) Notably, as of the time of this appeal, Judge Benjamin had not issued an Order following the March 2, 2018 hearing.

On July 7, 2018, nearly four (4) months after the Motion to Amend was filed, Vista Wings and the Aetius Companies served much of the discovery material and interrogatory responses sought by Mr. Finan in the March 2, 2018 hearing. (**Motion for Reconsideration, Ex. 21, Discovery Responses received July 9, 2018.**) In these responses, Vista Wings, for the first time, disclosed that Aetius Restaurant Group owns its membership interests. Promptly up the delivery of this discovery long sought in this case by Mr. Finan, the parties began working together to get the depositions scheduled of the various fact witnesses for Vista Wings and the Aetius Companies.

(Motion for Reconsideration, Ex. 22, Email exchange regarding deposition scheduling beginning July 9, 2018.)

Due to the need for an order from the hearing on March 2, 2018; the need additional discovery pending the receipt of this order; the need to conduct *de bene esse* depositions of out-of-state parties, and the fact that Mr. Finan's Motion to Amend had been pending for nearly five (5) months without being set for a hearing by Richland County, Mr. Finan filed a Motion for Continuance in this case on August 9, 2018. **(Motion for Continuance dated August 9, 2018.** Judge Hood, as Chief Administrative Judge of this Circuit, granted the Motion for Continuance on August 13, 2018. **(Order dated August 13, 2018.)**

The underlying record in this case is otherwise replete with examples of testimony that show that the Aetius Companies were involved in every aspect of the Event. Just by way of example, on September 24, 2018, Plaintiff took a *de bene esse* deposition of Ashley Coakley. Ms. Coakley further demonstrated the need to add the Aetius Companies as defendants to the lawsuit. She admitted that she was employed by one of the Aetius Companies, referred to her as Aetius Restaurant Holdings, as the Vice President of Marketing. She testified that, as a part of her normal employment for Aetius Restaurant Holdings, either she or her staff prepared the marketing and promotional materials for the Event. **(Deposition of Ashley Coakley, p. 3, l. 9 - p. 7, l. 20.)**

C. The Trial Court erred by simply concluding, without any analysis, that because the case was subject to being called for trial the following month after the hearing, that the Motion to Add Parties – which had been left pending six (6) months – should be denied.

As stated in Mr. Finan has a substantial right to control his Complaint and proceed to a trial on the merits against all proper Defendants in this case, and his Motion to Add Defendants should be freely given absence actual prejudice. Patton v. Miller, *supra*. The Orders prevent him from doing so, and they leave Mr. Finan with no choice but to file piecemeal litigation and bring

additional lawsuits on the same occurrence – which is a prejudicial waste of Mr. Finan’s time, money, and resources, not to mention the court’ resources. The Orders are further prejudicial because it adds additional hurdles and prejudice to his ability to rely on the relation-back doctrine under Rule 15(c), SCRCF.

Notably, the Motion to Add Defendants was not filed a month before the October 8, 2018, term of court when it might have next appeared on the docket. The Motion to Amend was filed nearly six (6) months prior to the hearing on the Motion to Amend. Therefore, the reasoning of the Order is flawed, as it holds Mr. Finan responsible for the scheduling of hearings in a busy circuit court system that was facing a known court reporter shortage and was eliminating civil terms of court. The Motion to Amend itself was in fact timely, being filed precisely one (1) week following the first discovery device – the deposition of Brian Neal – whereby Mr. Finan first learned of grounds, sufficient under Rule 11, SCRCF, to name the Aetius Companies as Defendants. The trial court failed to even consider or address this fact.

More importantly, the case was not even ready for any trial, the trial court simply assumed that the case would be called for trial at a term the following month. Mr. Finan served discovery with his Complaint. As the timeline above demonstrates, Vista Wings and the Aetius Companies themselves have acted to repeatedly delay and avoid discovery being conducted in this matter, materially delaying the case becoming ready for trial. Therefore, justice does not permit Vista Wings to characterize the Motion to Add Defendants as untimely or rely upon the mere fact that the lawsuit has been pending for over a year as the source of alleged “prejudice” to it. An Order from the Third Motion to Compel heard on March 2, 2018 (18 days before the Motion to Amend was filed) still has not been issued from the trial court. Judge Hood had already granted a Consent Order of Continuance in this case a month prior to the hearing on the Motion to Add Parties

because the case was not ready for trial. Counsel for Mr. Finan explained to the trial court that both parties agreed in that motion that depositions still needed to be scheduled and conducted in this matter prior to trial, which has not yet occurred. The trial court simply ignored this information.

As a matter of law, the fact that this Motion to Amend was heard a month before the case may appear again on a docket does not itself establish any prejudice to Vista Wings the non-moving party. Vista Wings has failed to articulate – much less show by any proper evidence or affidavit – how any delay from the amendment will put it “at a disadvantage in defending the merits, which disadvantage the party would not have faced if the amended claim had been included in the original pleading or a timely motion to amend.” Patton, 420 S.C. at 491, 804 S.E.2d at 262–63 (emphasis added). The record and the court’s Orders are devoid of any grounds to establish prejudice by that delay.

Conversely, the prejudice to Mr. Finan if the Motion to Amend is denied is material. First, as argued during the hearing on the Motion to Add Defendants, the denial of the Motion to Add Defendants deprives Mr. Finan of the ability to pursue his case and obtain a judgment against the proper entity and to seek payment from that entity or its insurer. Second, the denial of the Motion to Add Defendants subjects Mr. Finan to defenses by Vista Wings’ vicarious liability due to the employment relationships and conduct performed by natural persons working for its parents, the Aetius Companies. As explained to the trial court at the hearing and as stated in Appellant’s Memorandum on the Issue of Appealability to this court, the evidence discovered shows that the Aetius Companies appear directly and vicariously liable for many of Mr. Finan’s allegations of negligence. This fact, together with the absence of the Aetius Companies at trial, could preclude Mr. Finan’s ability to obtain a judgment at trial. The denial of the Motion to Add Defendants would

allow Vista Wings to pass responsibility for the negligence of certain managers and employees off on the Aetius Companies, precluding in part the judgment sought by Mr. Finan in his original Complaint. [**Transcript of Hearing dated September 6, 2018**]. Third, the denial subjects Mr. Finan to potential statute of limitation defenses that he may face if he were to now file a separate lawsuit against the Aetius Companies for the same conduct outlined in the Complaint.

While the order does not address this matter, even the Aetius Companies cannot be found to have suffered any prejudice as being added at this time. Due to the need to discover the information sought through written discovery, Mr. Finan has only deposed one (1) person in this case associated with Vista Wings or the Aetius Companies. If added at this time, the Aetius Companies would be able to participate in all of the meaningful discovery related to its liability. Moreover, as the self-proclaimed “parents” of Vista Wings, the Aetius Companies have already been involved in all material aspects of this litigation. Their employee and officer, Andy Johnson, is the one who has verified all of the written discovery produced by Vista Wings to date, so there is no question that the Aetius Companies can be found to be prejudiced by their addition.

Finally, the Order is silent on Mr. Finan’s Motion to Amend to the extent it seeks to drop Brent Weston and Aaron Miller from the caption in this case. As the parties have already filed Stipulations of Dismissal as to these parties, then there is no reason why the Motion to Amend should be denied in this regard. There was no cognizable basis to deny, without comment, MR Finan’s request to amend the caption.

CONCLUSION

For the foregoing reasons, Mr. Finan requests that the Orders be reversed, that Mr. Finan be permitted to amend his Complaint to add the Aetius parties as defendants and assert claims against them, and that he be permitted to submit a petition for costs under Rules 222 and 240,

SCACR.

Respectfully submitted,



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APPEAL FROM RICHLAND COUNTY
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Paul M. Burch, Circuit Court Judge

Case No. 2016-CP-40-07109

Richard A. Finan,Appellant,

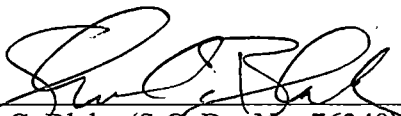
v.

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

PROOF OF SERVICE

The undersigned certifies that the foregoing **INITIAL BRIEF OF APPELLANT** and the **RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** were served together upon all counsel of record for the Appellants by causing a copy of the same to be deposited in the United States First Class mail, postage prepaid, addressed as follows:

Mark S. Barrow
Ryan C. Holt
William H. Yarborough, Jr.
Sweeny Wingate & Barrow, P.A.
P.O. Box 12129
Columbia, SC 29211


Shaun C. Blake (S.C. Bar No. 76349)

December 6, 2019

ROGERS LEWIS

ATTORNEYS AT LAW

Shaun C. Blake, Esq.
sblake@rogerslewis.com

December 6, 2019

RECEIVED
DEC 06 2019
SC Court of Appeals

Via Hand Delivery

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: *WFG National Title Insurance Company v. DataQuick Lending Solutions et al.*
Appellate Case No. 2018-001845

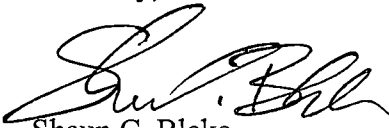
Dear Ms. Kitchings:

Enclosed please find an original and one (1) copies of Initial Brief of Appellant, Designation of Matter and Certificate of Service for same. Please file the original and return the two (2) clocked copies back to our office via the courier.

By copy of this letter, I am providing a copy of the enclosed to counsel of record.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

Sincerely,



Shaun C. Blake

Enclosures

cc: Mark S. Barrow
Ryan C. Holt
William H. Yarborough, Jr.
Sweeny Wingate & Barrow, P.A.
P.O. Box 12129
Columbia, SC 29211