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

Richard A. Finan, ...Appellant,

v.

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

INITIAL REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT RICHARD A. FINAN

TABLE OF AUTHORITIES

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ARGUMENT

A. Vista Wings urges error in contending that this appeal is untimely; this court ordered on November 8, 2019, that the appeal could proceed after nearly a year of "careful consideration" of the issue of appealability

In its first argument, Vista Wings contends that this appeal is untimely simply because the Orders do not constitute a final judgment. However, Vista Wings failed to address the "substantial right" exception to the final judgment rule or the South Carolina Supreme Court's decision in 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."). Likewise, Vista Wings failed to address the Court's decision in 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."). Because controlling authority establishes that a motion denying a plaintiff's ability to choose his defendants and the right to be the architect of his or her own complaint affects that plaintiff's substantial rights, the decision of the trial court refusing to allow Mr. Finan to amend his complaint and add additional joint tortfeasors is immediately appealable.

B. Vista Wings urges error in elevating technical form over substance when it contends this appeal fails because the Motion only cited to Rule 15, SCRCP.

Vista Wings never suggested to the trial court that Rule 15 was the improper civil rule to be referenced in the Motion, and the Orders did not adopt this reasoning. The only reasoning provided by the trial court for denying the Motion was the conclusory and misplaced assumption that the "proposed amendment adds unnecessary complication one month prior to the trial date" and a statement at the hearing that the parties just needed to "get this case settled." [**Transcript of Hearing dated September 6, 2018, pp. 10-14; Order dated September 7, 2018.**] Vista Wings'

argument was neither raised nor ruled upon and is not preserved for appeal. *See* State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal.")

Even if this issue was preserved, Vista Wings urges error. First, Vista Wings' argument ignores the fact that the proposed Amended Complaint included changes in the wording of the Complaint which affect the claims and defenses raised against and by Vista Wings. [**Motion to Amend dated March 20, 2018, with Exhibits.**] Second, Vista Wings' argument ignores that the Court found a similar argument by a respondent "troubling" in Patton v. Miller, 420 S.C. 471, 489, 804 S.E.2d 252, 261 (2017) (making it clear that the Rules of Civil Procedure "were never intended to trap a party simply for not using the proper words or rule number to describe the applicable legal principal."). Vista Wings improperly elevates form over substance, which is particularly clear when its argument is viewed in light of the fact that Vista Wings conceded the applicability of Rule 15 and argued against the Motion under the Rule 15 standard. [**Transcript of Hearing dated September 6, 2018, pp. 10-14; Memo in Opposition dated Sept. 25, 2018**]. Third, Vista Wings fails to point to any rule it contends a plaintiff should cite when seeking to amend its complaint and add defendants, much less identify any substantive analysis that a trial court must make under that rule and how it differs from the substantive arguments raised by the parties to the trial court.

The only case cited by Vista Wings to advance this argument is Valentine v. Davis, 319 S.C. 169, 460 S.E.2d 218 (Ct.App.1995), which is inapposite because the holding was that a plaintiff could not join a new plaintiff to the action simply by using Rule 15 and that the criteria of Rule 20(a) was not satisfied. Here, Vista Wings argument is that Rule 15 is improper because it would otherwise deprive the defendants sought to be added of the statute of limitations defense.

This argument is incorrect; the Aetius Defendants would still have the opportunity to raise the statute of limitations defense, which itself merely raises a defense to be decided by the jury. *See* Garner v. Houck, 312 S.C. 481, 485, 435 S.E.2d 847, 849 (1993) ("If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury.")

Vista Wings argument fundamentally fails to acknowledge that the negligence claims sought to be added against the Aetius Defendants are subject to the "discovery rule" under S.C. Code Ann. § 15–3–535, which provides that the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. *See* Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 526, 787 S.E.2d 485, 489-90 (2016) ("Therefore, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.") The mere possibility of a statute of limitations defense is no basis to deny a motion to amend a complaint and add defendant, particularly when the only evidence submitted to the trial court is that a plaintiff and its counsel diligently and at great expense sought to discover the identity and role of the corporate entities against which he might possess a cause of action.

C. Vista Wings urges error contending that the trial court used any discretion in considering the existence of prejudice and that, to the extent it did, that the trial court did not abuse that discretion by rewarding Vista Wings and the Aetius Companies for their dilatory behavior in discovery and penalizing Mr. Finan for the trial court's own delays.

Without repeating here the detailed account in Appellant's Initial Brief of Mr. Finan's prompt and extensive efforts from November 2016 through March 2018 to discover the identity

and role of those companies that are directly responsible for the negligent hiring, training and supervision claims resulting in Mr. Finan's injury, the record indisputably shows that: (1) Mr. Finan was not dilatory and was forced to file and pursue numerous Motions to Compel and Rule to Show Cause between March 6, 2017 and the March 2, 2018 hearing on Mr. Finan's Third Motion to Compel Discovery and Motion to Compel Subpoena Responses from the Aetius Companies; and (2) and that the discovery orders from the March 2, 2018 hearing had not even issued by the time this appeal was filed in November 2018. Vista Wings and the Aetius Companies spent over a year thwarting Mr. Finan's discovery of the Aetius Companies' role in the negligence that caused his injury, and now they disingenuously attempt to manufacture "prejudice" from the delay caused by their discovery misconduct and the trial court's failure to set a hearing on the Motion or issue orders on the discovery motions. Justice and equity should not allow this result, particularly when permission to amend a complaint should have been "freely given" to Mr. Finan.

The only "prejudice" that Vista Wings can contend the trial court actually ruled upon in denying the Motion was a "delay" of an alleged "trial date." Vista Wings cannot now cry "prejudice" by any delay in the progression of the case that it and the Aetius Companies created when it repeatedly stone-walled Mr. Finan in discovery for over a year.

The allegedly "prejudicial" delay was certainly not due to Mr. Finan's conduct. His undersigned counsel filed the Motion to amend the Complaint and add the Aetius Companies within a week of learning facts that would give rise to a cause of action against them and give a basis for a claim against them that could survive scrutiny under Rule 11, SCRCP. However, the trial court did not schedule a hearing on the motion until September 6, 2018. Mr. Finan committed no act to cause this five-month delay. Therefore, trial court abused its discretion incorrectly assuming that there was a "trial date" and penalizing Mr. Finan for the delays in scheduling during

a well-known and widely reported state-wide court reporter shortage and civil court docket delays in Richland and other counties.

Moreover, as the record in this case and the realities of trial practice well-known by this court demonstrate, a "roster notice" is not the same as a "trial date." Vista Wings' argument is particularly troubling in light of the very grounds stated in the joint motion signed by Vista Wings less than a month before the hearing on Mr. Finan's Motion to Amend; those grounds were:

> (1) The parties are still awaiting an Order from a Motion to Compel hearing conducted in March 2018.
>
> (2) The parties have additional discovery to conduct.
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> (3) De bene esse depositions of out of state witnesses are currently planning to go forward on August 20, 2018 in Charlotte, NC.
>
> (4) The Plaintiff filed an opposed Motion to Amend the Complaint on March 20, 2018, which is currently set to be heard on September 6, 2018.
>
> Therefore, the parties jointly move that the trial be continued until the October 8, 2018 term of court.

[**Consent Motion for Continuance dated August 9, 2018.**] Based on these representations by Vista Wings, Judge Hood granted the Motion for Continuance on August 13, 2018. [**Order dated August 13, 2018.**] Moreover, while Vista Wings' Motion for Reconsideration of the Order denying his Motion was pending, Vista Wings consented to the following submission to the trial court as the basis of another motion for continuance of any "trial date":

> (1) The parties are awaiting an order on Plaintiff's Motion to Compel Discovery, Plaintiff's Rule to Show Cause, and Defendant's Motion to Quash, which were heard by Judge Benjamin in March 2018. We have submitted proposed orders and feedback on the order, as well as a transcript of the hearing that Judge Benjamin's office requested and are awaiting a ruling.
>
> (2) The Plaintiff has additional depositions, including a Rule 30(b)(6) deposition of the Defendant, to take once the records discovery is resolved by the court. Fact witness depositions last week have identified for both parties that the Defendant has documents that need to be produced.

> (3) On March 20, 2018, the Plaintiff moved to amend the Complaint to add four additional defendants and to amend the caption to remove settling parties. That motion was heard on September 6, 2018. Judge Burch issued an order denying the motion on September 7, 2018. The Plaintiff timely filed a detail Motion for Reconsideration on September 13, 2018, and the Defendant has since filed a brief in opposition to the motion for reconsideration. No party has requested a hearing on the motion, and now the parties are awaiting a ruling from Judge Burch on this motion for reconsideration. If the motion is granted, then the parties will have additional discovery to conduct; if the motion is denied, Plaintiff intends to immediately appeal that denial so that he is not required to try the case without all parties in front of the court and jury that may be directly or vicariously liable for the conduction complained of in the Complaint.

[**Consent Motion for Continuance dated October 3, 2018.**] Vista Wings' narrative that either party to the case had substantially completed discovery and that this case was ever ready for trial is disingenuous. Indeed, by these joint and consent submissions immediately before the trial court's issuance of each Order, Vista Wings is judicially estopped from contending that the trial court correctly found "prejudice" because the case was ready for trial at any time before or within a month of the hearing on Mr. Finan's Motion. Therefore, the trial court abused its discretion.

Finally, Vista Wings argues that "futility" – a factor never ruled upon by the trial court and therefore not preserved for appeal – requires this appeal to fail. First, Vista Wings commits a straw-man fallacy and mischaracterizes the proposed Amended Complaint. The amendment did not seek to just make the Aetius Companies liable as "alter egos" of Vista Wings; the entire thrust of the amendment is that the Aetius Companies may be found to be joint tortfeasors for the claims of negligent hiring, training, and supervision – they may be found by a jury to be very parties that Vista Wings may assert bear liability under the comparative and intervening negligence defenses raised in Vista Wings' Answer to the original Complaint. [**Proposed Amended Complaint.**] This is why the amendment is critical.

Likewise, Vista Wing's contention that the mere fact the Aetius Companies may possess an affirmative defense based on the statute of limitations somehow is controlling of the outcome

of the Motion to Amend and this appeal is a red herring. As detailed in Appellant's Initial Brief, the record demonstrates that the statute of limitations still has not expired on Mr. Finan's claims against the Aetius Companies due to Mr. Finan's inability, despite all diligence, to identify their role in the negligence that caused him to be savagely beat at the Wild Wing Café in Columbia's Vista. As noted above, the statute of limitations is subject to the discovery rule and presents a jury question in this case – not a basis for denying a motion to amend and add parties.

Rule 1, SCRCP, makes it clear that our civil rules are to "be construed to secure the just, speedy, and inexpensive determination of every action." Likewise, this court has noted, "[a]n obvious purpose of the legislation concerning contribution among joint tortfeasors is to reduce the amount of litigation." G & P Trucking v. Parks Auto Sales Serv. & Salvage, Inc., 357 S.C. 82, 88, 591 S.E.2d 42, 45 n. 8 (Ct.App.2003) (quotation omitted). Vista Wings and its affiliates, the Aetius Companies, spent over a year preventing Mr. Finan from identifying the identity of other tortfeasors. Mr. Finan acted diligently to discover the Aetius Companies' identity and potential role in his injuries, and it is outside the purpose of our rules to award efforts to thwart and delay discovery. Likewise, it is outside the purpose of our rules and against the intention of the South Carolina Contribution Among Joint Tortfeasors Act, S.C. Code Ann. § 15-38-10, et seq. to encourage needless, duplicative lawsuits over a common set of facts and an indivisible injury. Finally, it is outside the purpose of our rules to penalize Mr. Finan for the delayed actions of the trial court which are in no way Mr. Finan's fault. Affirming the trial court's decision to deny the Motion to Amend would be to defy both the purpose of Rule 15 stated in Patton and the South Carolina Legislature and Supreme Court's goal of a just, speedy, and inexpensive determination of Mr. Finan's injuries for negligence caused by joint tortfeasors.

CONCLUSION

For the foregoing reasons and the arguments stated in his Initial Brief, Mr. Finan respectfully requests that the Orders of the trial court denying his Motion to Amend be reversed, that Mr. Finan be permitted to amend his Complaint as reflected in the Exhibit to the Motion to Amend Complaint and to add the Aetius Companies 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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March 13, 2020

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PROOF OF SERVICE

The undersigned certifies that on March 13, 2020, the **INITIAL REPLY BRIEF OF APPELLANT** and the **APPELLANT'S AMENDED 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:

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March 13, 2020

Via U.S. First Class Mail
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Re: Finan v. Vista Wings, LLC d/b/a Wilding Wing Café – Columbia, et al.
Appellate Case No. 2018-002054

Dear Madam Clerk:

Enclosed please find an original and one (1) copy of the Initial Reply Brief of Appellant, the Appellant's Amended Designation of Matter to Be Included in the Record on Appeal, and the Proof of Service for the same. I have enclosed a self-addressed stamped envelope; please file the original and return the one (1) clocked copy to my office using the enclosed envelope.

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

Thank you for your assistance. If you have any questions, please contact me.

Sincerely,

Shaun C. Blake, Esq.

cc: w/ enclosures
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