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 № 2018-002054

Richard A. Finan, ... Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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3. **Did the circuit court err by denying Appellant's Motion to Amend in the absence of any evidence of mistaken identity and where the addition of Respondent's parent companies as parties one month prior to the trial date that had been continued multiple times would unduly prejudice Respondent?**

4. **Did justice require the circuit court to grant Appellant's Motion to Amend where the statute of limitation had expired against the putative defendants?**

5. **Should the Court affirm the circuit court's order for any reason contained in the record?**

STATEMENT OF THE CASE

This case arises out of a physical altercation in Wild Wings Café in Columbia, South Carolina on June 5, 2015. (R. p. 012). Appellant filed suit on December 1, 2016. (R. p. 011). Appellant named Vista Wings, LLC d/b/a Wild Wing Café-Columbia ("Respondent"), as well as two employees, Brent Weston and Aaron Miller. (R. p. 011). As to Respondent, Appellant brought causes of action for negligence, negligence *per se*, and gross negligence; false imprisonment; assault and battery; negligent hiring, training, retention and supervision; premises liability; and dram shop liability. (R. pp. 014-022). Appellant dismissed defendants Brent Weston and Aaron Miller on March 1, 2018. (R. p. 720). Respondent denies that it breached any duty owed to Appellant and that his injuries were due to his own comparative negligence and the negligence of third parties with whom he fought. (R. pp. 024-031).

On March 20, 2018, Appellant moved to amend his Complaint ("Motion to Amend") pursuant to Rule 15, SCRCP. (R. p. 052). Appellant moved to add the following parties: Axum Capital Partners, LLC; Axum Capital Partners Management, LLC; Aetius Restaurant Group,

LLC; Aetius Restaurant Group, LLC; Aetius Franchising, LLC; Aetius Holdings, LLC; Craig Hepfner; and Santana Griffin (collectively hereinafter "Corporate Entities"). (R. p. 052). The circuit court heard argument on Appellant's Motion to Amend on September 6, 2018. On September 7, 2018, the court denied Appellant's Motion to Amend. (R. p. 005).

On September 13, 2018, Appellant filed his Motion to Reconsider, Alter, and Amend Order Denying Plaintiff's Motion to Amend the Complaint ("Motion to Reconsider"). (R. p. 074). Respondent filed a Memorandum in Opposition to Plaintiff's Motion to Reconsider ("Memo in Opposition") on September 26, 2018. (R. p. 713). The court denied Appellant's Motion to Reconsider on October 17, 2018. (R. p. 008).

On November 16, 2018, Appellant initially appealed the court's September 7, 2018 Order Denying Plaintiff's Motion to Amend Complaint and October 17, 2018 Order Denying Plaintiff's Motion to Reconsider. On December 20, 2018, this Court requested both parties submit memorandum addressing the issue of appealability. On December 28, 2018, Respondent filed its Memorandum in Re Appealability. On December 31, 2018, Appellant filed its Memorandum on the Issue of Appealability. In an Order dated February 28, 2019, this Court dismissed the appeal as interlocutory. Appellant filed a Petition for Rehearing on March 11, 2019. Respondent filed a Return to Appellant's Petition for Rehearing on September 19, 2019. On November 8, 2019, the Court reinstated Appellant's appeal.

STANDARD OF REVIEW

In a case such as this, the Court reviews the order of the circuit court under an "abuse of discretion" standard. *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 812 (2013); *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 431 S.E.2d 587 (1993). It is within the discretion of a circuit judge to deny a motion to amend unless two things

are true—(1) justice requires that the motion be granted and (2) no other party is prejudiced. Rule 15(a), SCRCP. If both elements are true, amendment of a pleading shall be freely given. However, if even one of these elements is lacking, the court may rightly deny the motion and, in doing so, has not abused its discretion.

ARGUMENT

I. The circuit court's denial of Appellant's Motion to Amend is not immediately appealable.

"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, SCRCP; 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)).

This Court has previously addressed the appealability issues presented by this case. In *Tillman v. Tillman*, this Court dismissed an appeal following a denial of a motion to amend,

stating "[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." 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017) (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. Therefore, this Court should dismiss Appellant's appeal because the denial of his Motion to Amend is not immediately appealable.

II. The circuit court did not err by denying Appellant's Motion to Amend pursuant to Rule 15, SCRCP, because the rule does not permit amendment to add new parties.

In the alternative, if the Court determines that Appellant may appeal the circuit court's denial of its Motion to Amend, the Court should affirm the circuit court's order. Appellant filed his Motion to Amend on March 20, 2018. (R. p. 052). The motion begins, "Pursuant to Rule 15, SCRCP" and further quotes exact language from the Rule. (R. p. 052). Plaintiff requested relief under the wrong rule. "Rule 15(a) only permits an existing plaintiff to add, modify, delete, or change claims against an *existing* defendant." *Valentine v. Davis*, 319 S.C. 169, 172, 460 S.E.2d 218, 219 (Ct. App. 1995) (emphasis added). The *Valentine* Court also stated, "Rules 15, 20 and 21 are applicable only to existing parties." *Id*. at 171, 460 S.E.2d at 219. This principle logically follows from the wording of Rule 15(c), which provides for the relation back of amendments to the date of the original pleadings. Because the new parties that Appellant seeks to add were not sued within three years of his injury, torturing Rule 15 to permit an amendment of these parties would rob them of the statutory protections that provide a limitation on civil action. *See* S.C. Code Ann. § 15-3-530(5).

III. The circuit court did not err by denying Appellant's Motion to Amend, because the addition of Respondent's parent companies as parties one month prior to the trial date would unduly prejudice Respondent and justice did not require the amendment.

If more than thirty days has passed since the filing of a pleading, Rule 15(a), SCRCP permits a party to amend "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Appellant has failed to meet both requirements of Rule 15, SCRCP. Amending the pleadings in order to join the Corporate Entities will unduly prejudice Respondent and justice does not require the amendment.

A. The circuit court acted within its sound discretion by denying Appellant's Motion to Amend where the addition of Respondent's parent companies as parties one month prior to the trial date would have unduly prejudiced Respondent.

The facts of this case reveal prejudice as contemplated in Rule 15, SCRCP. "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 v. Miller*, 420 S.C. 471, 491, 804 S.E.2d 252, 262–63 (2017). The Supreme Court supported its definition of prejudice in *Patton* by citing to the Court of Appeals' decision in *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 235-36, 754 S.E.2d 714, 719 (Ct. App. 2014). The *Patton* Court summarized the *Holland* decision as one that affirmed "the denial of a proposed amendment after the conclusion of discovery and the case had been placed on the trial roster because it would cause significant delay and impose substantial additional discovery costs that would not have been necessary if the plaintiff had timely made the motion to amend." *Patton*, at 492, 804 S.E.2d at 263. That is precisely what happened in the case *sub judice*.

This case was filed in the Richland County Court of Common Pleas on December 1, 2016. (R. p. 010). Pursuant to the South Carolina Rules of Civil Procedure, the case was eligible for trial on or after December 1, 2017. *See* Rule 40(f), SCRCP. The Clerk of Court of Richland County first scheduled the case to be tried during the term beginning December 4, 2017. (R. p. 737). The trial was continued and set for a second time for the term beginning February 20, 2018. (R. p. 732). The trial was continued. Appellant filed his Motion to Amend the Complaint on March 20, 2018. (R. p. 052). By the time of the motion hearing on September 6, 2018, the case had been set for trial four more times. (R. p. 733-736). As of the hearing date, the case was scheduled for trial during the week of October 8, 2018.

This appeal is based on Appellant's desire to complicate an otherwise simple negligence case by adding defendants who are corporate parents and grandparents of the Respondent, which is a duly organized entity in its own right. Appellant argues the delay in making his Motion to Amend is due to discovery disputes. The procedural timeline suggests otherwise. Plaintiff knew about the corporate relationships of Respondent at least as early as March 2017, when Respondent responded to discovery requests by producing a Named Insured Schedule which listed Aetius Restaurant Group, LLC, Aetius Franchising, LLC and Aetius Holdings, LLC, the same corporate entities Appellant sought to add in his March 20, 2018 Motion to Amend. (R. pp. 143, 727). Despite Appellant's full knowledge of these corporations, he delayed a full year before making the motion while the case was on the active trial docket and had appeared on two published rosters.

Contrary to Appellant's assertions on brief, the circuit court considered prejudice to Respondent in rendering its decision. In oral argument at the hearing, Defense counsel highlighted the late hour of the motion filing, noting that Respondent was ready to proceed with

trial six months earlier. (R. p. 041, line 23–p. 042 line 3; R. p. 043, line 21-24). Appellant's efforts to delay the trial were specifically cited. (R. p. 042, line 15-20). Respondent also discussed the nature of prejudice in the case, namely the distinction between adding a new *claim* versus adding a new *party*. (R. p. 043, line 2-19). The record reveals that the circuit court heard and considered these arguments. The court specifically noted that the addition of new parties would complicate the case and also noted the delay in filing the motion. (R. p. 049, line 6-8). Thus, the Respondent would have been prejudiced by the addition of new defendants.

While Respondent's trial is—and has been—ready to proceed on the merits for at least a year, adding the Corporate Entities as co-defendants would result in at least six more months of litigation,[1] at high cost to Respondent. Because new parties would be likely to seek the right to re-depose witnesses who have already been deposed, much of the discovery will be rehashed at significant cost to Respondent. This is due to no fault of Respondent, but rather due to the delay of Appellant who could have sued these Corporate Entities at the outset of his claim, prior to the expiration of the statute of limitations, such that all parties could have litigated simultaneously and efficiently. Therefore, the circuit court did not abuse its discretion in denying Appellant's Motion to Amend.

B. The circuit court acted within its sound discretion by denying Appellant's Motion to Amend because Appellant failed to present evidence of mistaken identity such that justice would require the amendment.

This is not a case of mistaken identity. Appellant does not seek to substitute a current party for a new party of a different name. Rather, he seeks to add separate entities while maintaining his suit against the named Respondent. Therefore, amendment cannot be made pursuant to Rule 15(c)(2).

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[1] "…no action may be called for trial until 180 days after service of the last pleading which adds a new party to the action, unless all parties consent in writing." Rule 40(b), SCRCP.

C. The circuit court acted within its sound discretion by denying Appellant's Motion to Amend because Appellant failed to present evidence of alter ego such that justice would require the amendment.

This Court has previously held that the alter ego doctrine should be applied when determining whether a parent company should be held liable for the actions committed by a subsidiary. The alter ego doctrine provides that in order for a parent company to be liable for the actions of a subsidiary, the parent company "must control the business decisions and actions of its subsidiary", and therefore "the subsidiary becomes an instrument or alter ego of the parent." *Jones ex rel. Jones v. Enterprise Leasing Company-Southeast,* 383 S.C. 259, 276, 678 S.E.2d 819, 824 (Ct. App. 2009) (citing *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club,* 310 S.C. 132, 148, 425 S.E.2d 764, 774 (Ct. App. 1992)). The level of control required for liability under the alter ego doctrine "amounts to total domination of the subsidiary to the extent the subsidiary manifested no separate corporate interests and functioned solely to achieve the purpose of the dominant corporation." *Id.* (citing *Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp.,* 483 F.2d 1098, 1106 (5th Cir.1973)).

The Court should consider additional factors in order to apply the alter ego doctrine. For example, even if both a parent and subsidiary share common officers, directors, and public identification, these factors alone are not sufficient to make the determination that the subsidiary is the "alter ego" of the parent company. *Jones ex rel. Jones,* at 267, 678 S.E.2d at 823-24 (citing *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.,* 275 S.C. 151, 153-54, 268 S.E.2d 42, 44 (1980)). Further, simply "establishing the level of control or dominance a parent must have over a subsidiary, in order to prove it is the alter ego of the subservient corporation, is not sufficient to maintain an alter ego action." *Id.* at 267-268, 678 S.E.2d at 824 (citing *Mid-South Mgt. Co. Inc. v. Sherwood Dev. Corp.,* 374 S.C. 588, 603-04, 649 S.E.2d 143 (Ct.App.2007)).

The burden of proof on the plaintiff is significant. The plaintiff must demonstrate that "the retention of separate corporate personalities would promote fraud, wrong or injustice, or would contravene public policy." *Id.* (citing *Mid-South Mgt.*, 374 S.C. at 603, 649 S.E.2d at 143). Therefore, merely establishing superficial similarities mentioned above are not sufficient to prove that a subsidiary is an alter ego of its parent company.

Additionally, several factors must be considered before a parent company may be liable for the tortious acts of a subsidiary. *Jones ex rel. Jones, supra.* These factors to be considered include: "stock ownership by parent; common officers and directors; financing of subsidiary by parent; payment of salaries and other expenses of subsidiary by parent; payment of salaries and other expenses of subsidiary by parent; failure of subsidiary to maintain formalities of separate corporate existence; identity of logo; and plaintiff's knowledge of subsidiary's separate corporate existence." 16 Am.Jur. *Proof of Facts* 2d 679 (2006).

Because the record is devoid of any evidence to suggest that Respondent's parent corporations are its alter egos, justice did not require the circuit court to grant the motion to amend.

D. The circuit court acted within its sound discretion by denying Appellant's Motion to Amend because Appellant's efforts to add new parties were futile.

While Rule 15(a), SCRCP, provides leave to amend shall be freely given, this encouragement is not without exception. Indeed, the South Carolina Supreme Court has adopted the principles of the United States Supreme Court, finding that amendment should occur only in the absence of "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." *Patton v. Miller*,

420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017), reh'g denied (Sept. 27, 2017), *citing Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962).

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. (R. p. 012). Thus, the statute of limitations has passed and Appellant may not amend his Complaint to join additional parties and skirt this limitation. *See, e.g., Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000).

Appellant's proposed amended summons and complaint, filed as an exhibit to their Motion to Amend, fails to satisfy the filing requirements of Rule 3(a), SCRCP. Even if the court took the unprecedented step of considering the proposed amended summons and complaint, Appellant failed to satisfy the requirements of Rule 3(a)(1)–(2), SCRCP. 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.

IV. The circuit court did not err in denying Appellant's Motion to Amend because the statute of limitations ran prior to adding the putative defendants.

Appellant argues the circuit court's orders prevented him from relying on the relation-back doctrine under Rule 15(c), SCRCP. "However, relation back applies only when an existing party is changed, not when a new party is added to a complaint." *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371, 597 S.E.2d 27, 29, FN. 2 (Ct. App. 2004), citing *Jackson v. Doe*, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct.App.2000). "The language of Rule 15(c) clearly speaks to a change in party, not the addition of a defendant to an already existing defendant. In our

view, the addition of a party is not the same as a substitution or change of party." *Jackson*, *supra*, citations omitted. Because the statute of limitations expired prior to the circuit court hearing the motion to amend, granting it would have been futile. *See Health Promotion,* at 632, 743 S.E.2d at 813 ("Even if the motion had been timely, Judge Keesley found the amendments involving civil conspiracy would be "futile" as the Board would be immune from suit for claims involving the commission of intentional torts under the TCA.").

Appellant could have filed a separate, second lawsuit against the putative parties prior to the expiration of the statute of limitations. Indeed, Appellant's counsel acknowledged that he *could* do just that, yet inexplicably chose not to. (R. p. 728[2] ("…I intend to file a motion to amend tomorrow afternoon so that I do not have to file a separate lawsuit only [*sic*] deal with what I am sure will be your clients' motion to consolidate the actions rather than conduct two trials once I do.")). Thus, Appellant was barred from adding the putative defendants because the statute of limitations ran prior to the circuit court's hearing on Appellant's Motion to Amend. Therefore, the court did not abuse its discretion in denying Appellant's Motion to Amend.

V. The Court should affirm the circuit court's order for any reason contained in the record.

Pursuant to Rule 208(b)(2), SCACR, Respondent respectfully requests that this Court affirm the circuit court's order for any ground appearing on the record as provided by Rule 220(c), SCACR.

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[2] This exhibit includes only the first of four pages in an email thread between counsel. The remaining pages contain a discussion of discovery as well as settlement negotiations and have therefore been left out of the exhibit. The full email thread is certainly available should the Court require it.

CONCLUSION

In light of the arguments above, Respondent respectfully requests this Court to hold that the circuit court did not err by denying Appellant's Motion to Amend and Motion to Reconsider.

Respectfully submitted,

April 15, 2020

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR as the only changes consist of the correction of typographical errors and Table page numbers, revision of citations to the Record on Appeal (including removal of citations to materials not included in the Record based upon agreement of counsel), and formatting to ensure that orphan headings were not left at the bottom of pages.

April 15, 2020

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