

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
In the Court of Common Pleas for the Fifteenth Judicial Circuit
Hon. Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2020-000407

Douglas Kelsey Plaintiff,

v.

House of Blues Myrtle Beach Restaurant Corporation;
HOB Entertainment, Inc.; and Travis Scott Wagoner Defendants,

AND

House of Blues Myrtle Beach Restaurant Corporation Third-Party Plaintiff,

v.

Throttlefest, LLC; American Outlaw Spirits Incorporated; Full Throttle, LLC; and Full Throttle
Sloon Shine, LLC Third-Party Defendants,

of which House of Blues Myrtle Beach Restaurant Corporation is the Appellant
and Throttlefest, LLC is the Respondent.

MEMORANDUM IN SUPPORT OF
RESPONDENT’S MOTION TO DISMISS

RECEIVED

APR 30 2020

SC Court of Appeals

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Jeffrey M. Bogdan, Esq.
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Counsel for Respondent

Respondent hereby submits this Memorandum in Support of its Motion to Dismiss Appeal, pursuant to Rule 240(c) of the South Carolina Appellate Court Rules.

PROCEDURAL HISTORY

This appeal stems from a dram shop lawsuit where Plaintiff Douglas Kelsey claims he was injured in a motorcycle accident caused by Travis Wagoner on May 16, 2014, after Plaintiff alleges that Wagoner was served alcohol past the point of intoxication at Appellant's establishment in North Myrtle Beach, South Carolina. Plaintiff filed his initial Complaint in this case on May 12, 2017. He named Appellant as a Defendant, but not Respondent. On July 7, 2017, Plaintiff filed an Amended Complaint, naming both Appellant and Respondent, amongst others, as Defendants. In the Amended Complaint, Plaintiff alleged that Michael Garner was simultaneously an employee or agent of both Appellant and Respondent, that he was selling alcohol under House of Blues' alcohol license, and that he, along with other persons, overserved Wagoner prior to the accident. Appellant did not file any counterclaims against Respondent.

Respondent settled with the Plaintiff and received a full and final release of all liability and damages of any kind relating to the injuries the Plaintiff sustained from the accident allegedly caused by Mr. Wagoner and his intoxication. Despite obtaining the Release from the Plaintiff, Appellant refused to consent to Respondent's dismissal from the case, even though Appellant did not have any claims pending against Respondent. Respondent was forced to file a motion to dismiss, which Appellant opposed. The Circuit Court granted Respondent's motion to dismiss on December 11, 2018. Respondent was out of this case and Appellant did not appeal.

On October 15, 2019, Plaintiff filed his Second Amended Complaint, which did not include Respondent as a defendant.¹ Plaintiff's Second Amended Complaint alleges that it was solely Appellant's employees and agents that served Travis Wagoner alcohol to the point of intoxication and caused the accident. Plaintiff's Second Amended Complaint cites to specific documents from the Appellant showing that Michael Garner was acting as Appellant's employee on May 16, 2014 when he allegedly gave Wagoner two shots of liquor. Plaintiff's Second Amended Complaint alleges that Michael Garner was solely Appellant's employee and cites to Appellant's sworn testimony admitting the same. Plaintiff alleges that when he filed his first Amended Complaint (which named Respondent as a Defendant) he had not yet discovered that Michael Garner was solely Appellant's employee.

On October 18, 2019, Appellant filed its Answer to the Second Amended Complaint and included a Third-Party Complaint against Respondent and others, attempting to bring Respondent back into this case after it had already settled and been dismissed. Appellant asserted six causes of action against Respondent: Breach of Contract, Negligent Misrepresentation, Negligence, Equitable Indemnification, Contractual Indemnification, and Contribution. Respondent moved to dismiss Appellant's Third-Party Complaint, which the Circuit Court granted based largely on Appellant's Third-Party Complaint being barred by the statute of limitations and the fact that Plaintiff had already released Respondent. At this point, Respondent had been twice dismissed as a defendant-party to this case. After the Circuit Court denied Appellant's motion to reconsider, Appellant filed its Notice of Appeal. Notably, the case is still pending in the Circuit Court, as the Plaintiff's claims against Appellant are still proceeding along with counterclaims that Respondent

¹ The initial Complaint and the Amended Complaint had two Plaintiffs, Douglas Kelsey and Mark Shimmenger. Mr. Shimmenger is not included as a Plaintiff in the Second Amended Complaint.

filed against Appellant in response to the Third-Party Complaint and the Appellant's claims against other third-party defendants.

ARGUMENT

The right of appeal arises from and is controlled by statutory law. North Carolina Federal Sav. and Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 347 S.E.2d 97 (1986). An appeal ordinarily may be pursued only after a party has obtained a final judgment. Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993); S.C. Code Ann. § 14-3-330(1) (1976); Rule 72, SCRCP; Rule 201(a), SCACR. 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. Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005); Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002). The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330. An order generally must fall into one of several categories set forth in that statute in order to be immediately appealable. Hagood, 362 S.C. at 194-95, 607 S.E.2d at 708; Baldwin Constr. Co. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004); Mid-State Distributors, 310 S.C. at 333 n. 3, 426 S.E.2d at 780 n. 3.

S.C. Code Ann. § 14-3-330 grants appellate jurisdiction in the following circumstances:

(1) Any *intermediate* judgment, order or decree in a law case *involving the merits* in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order *affecting a substantial right* made in an action when such order (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;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

(emphasis added). “The provisions of Section 14–3–330 . . . have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial.” Hagood, 362 S.C. at 196, 607 S.E.2d at 709.

An order “involving the merits,” as used in §14-3-330(1), is an order that must finally determine some substantial matter forming the whole or part of some cause of action or defense. State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013); Mid-State Distributors, 310 S.C. at 334, 426 S.E.2d at 780; Stone v. Thompson, 418 S.C. 599, 795 S.E.2d 49 (Ct. App. 2016). For an order to affect a substantial interest under §14-3-330(2), it must “determine the action and prevent a judgment from which an appeal might be taken or discontinue the action.” Woodard v. Westvaco Corp., 319 S.C. 240, 243, 460 S.E.2d 392, 394 (1995).

In Tillman v. Tillman, 420 S.C. 246, 801 S.E.2d 757 (Ct. App. 2017), the Court of Appeals of South Carolina found that an order granting a motion to dismiss but leaving other matters to still be decided by the trial court was not an immediately appealable interlocutory order under S.C. Code §14-3-330. First, the Tillman Court found that the order granting the motion to dismiss was not immediately appealable under §14-3-330(1) because it left issues to be decided by the circuit court. Id. at 249, 801 S.E.2d at 759. Next, the Tillman Court held that the order granting the

motion to dismiss did not affect a substantial right, again because there was still work for the circuit court to do and the appellant could wait until the final judgment to appeal all matters. Id. at 250-51, 801 S.E.2d at 759-60.

Here, just like in Tillman, the Circuit Court's Order granting Respondent's Motion to Dismiss Appellant's Third-Party claims has not entirely disposed of the case. Still remaining in the Circuit Court are the Plaintiff's claims against Appellant, Appellant's Third-Party claims against other third-party defendants,² and Respondent's Counterclaims against Appellant. See Wetzels v. Woodside Dev. Ltd. P'ship, 364 S.C. 589, 592-93, 615 S.E.2d 437, 438-39 (2005) (an order granting a motion to dismiss under Rule 12(b)(5) is immediately appealable, but only because it ends the action as to the party being dismissed). According to Tillman, since there are still matters pending in the Circuit Court, the order granting Respondent's Motion to Dismiss is not a final judgment and is not immediately appealable because it neither involves the merits nor affects a substantial right of Appellant. Judicial economy favors dismissing this appeal now. If this appeal is allowed to proceed, the Court of Appeals may soon have three or more separate piecemeal appellate actions pending from the same underlying action. If the Circuit Court denies Appellant's Motion to Reconsider the dismissal of the other third-party claims, the Appellant may appeal that order. Then, depending on the outcome of the trial or dispositive motions on the Plaintiff's claims against Appellant and Respondent's claims against Appellant, an appeal or numerous appeals could arise therefrom. On the other hand, if Appellant finds the need to appeal after trial, it can file one appeal and include all issues. Or, if Appellant is successful at trial against the Plaintiff and obtains a defense verdict, the ancillary litigation between Appellant, Respondent,

² The other third-party defendants also moved to dismiss Appellant's third-party claims. The Circuit Court granted that motion, but Appellant filed a Motion to Reconsider, which is still pending in the Circuit Court.

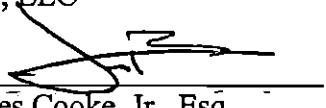
and the other third-party defendants may evaporate, as those claims center on Appellant's claim it is entitled to indemnification.

Respondent respectfully asks that this appeal be dismissed and that Appellant wait until a final judgment to appeal all matters related to this case, if necessary.

Respectfully submitted,

April 28, 2020

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and Throttlefest, LLC is the Respondent.

PROOF OF SERVICE

I certify that I have served the Motion to Dismiss and Memorandum in Support of Motion
to Dismiss on the above-referenced Appellant by depositing a copy of it in the United States Mail,
postage prepaid, on April 28, 2020, addressed its attorneys of record, as follows:

Christian Stegmaier, Esq.
Collins & Lacy
P.O. Box 12487
Columbia, SC 29211

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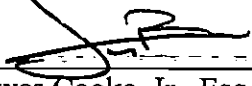
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April 28, 2020

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Reply to Charleston Office

April 28, 2020

59.037
The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Douglas Kelsey v. House of Blues Myrtle Beach
Appellate Case No. 2020-000407

Dear Ms. Kitchings,

Enclosed please find Respondent’s Motion to Dismiss, Memorandum in Support of Motion to Dismiss and Proof of Service of the same. I have also enclosed a \$50.00 check for the filing fee. Pursuant to the recent Order from the South Carolina Supreme Court, only the originals are enclosed for filing. No additional copies have been provided at this time.

Thank you for your assistance.

Yours truly,

Jeffrey Bogdan

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SC Court of Appeals

JMB/jgc
Enclosures

cc: Christian Stegmaier, Esq.
Amy Lynn Neuschafer, Esq.
Laura Ruth Baer, Esq.

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REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

**BARNWELL
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