THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas for the Thirteenth Circuit

Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No.: 2019-001707

George H. Brock, ... Appellant,

v.

Kris Langville, Individually, and d/b/a Preferred Paralegals, LLC; Donna Carlson; Jeremy Marsh, Individually, and d/b/a The Techknow Dude, LLC; and Katherine Jernigan, ... Defendants,

Of Which

Kris Langville, Individually, and d/b/a Preferred Paralegals, LLC; Donna Carlson; and Katherine Jernigan are the..... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in dismissing Brock's civil conspiracy action against Respondents pursuant to Rule 12(b)(7), SCRCP?

STATEMENT OF THE CASE

Appellant George H. Brock ("Brock") appeals the circuit court's dismissal of his civil conspiracy action against Kris Langville, individually, and d/b/a Preferred Paralegals, LLC ("Langville"), Donna Carlson, and Katherine Jernigan (collectively, "Respondents").[1]

On August 3, 2018, Brock filed a complaint alleging civil conspiracy against Respondents. Respondents filed an answer and counterclaims on October 29, 2018. On January 22, 2019, Respondents filed a motion to dismiss pursuant to Rule 12, SCRCP. As stated in their Motion to Dismiss, Brock's "cause of action for civil conspiracy against Defendants is an attempt . . . to retry a case that Plaintiff lost and for which [sic] Plaintiff was required to add such Defendants in the previous matter, Plaintiff is barred from bringing such claim via issue preclusion and res judicata." (R. p. 23).

Both parties submitted briefs, and the circuit court heard oral argument on March 7, 2019. While acknowledging that Brock made a "very good argument," the circuit court stated that "we can't allow the court to be clogged up with case, after case, after case where we start talking about the same kind of dispute." (R. p. 79, lines 19-23). At the close of the hearing, the circuit court instructed Brock and Respondents to submit proposed orders within 30 days.

A second hearing regarding Respondents' Motion to Dismiss occurred on July 23, 2019, at which "additional evidence" was presented. After listening to oral argument, the circuit court instructed the parties to resubmit their proposed orders and any supporting memoranda. On September 9, 2019, the circuit court dismissed Brock's civil conspiracy action against Respondents pursuant to Rule 12(b)(7), SCRCP. In its Order of Dismissal, the circuit court found "that Plaintiff [Brock] failed to properly join Defendants in his previous action

[1] Jeremy Marsh, individually, and d/b/a The Techknow Dude, LLC, is not a party to this appeal.

pursuant to Rule 19, S.C.R.C.P., and is therefore subject to dismissal pursuant to Rule 12(b)(7) . . . ." (R. p. 3). Brock filed a notice of appeal on October 9, 2019.

STATEMENT OF FACTS

Brock filed this civil conspiracy action against Respondents on August 3, 2018. In early 2016, a former bookkeeper at Brock's public accounting practice, Ronald Johnson, sued Brock, alleging unpaid wages (the "2016 case"). Johnson filed his lawsuit pro se but later hired counsel for Respondents. Brock's trial counsel asserted four counterclaims against Johnson: interference with a business opportunity, fraud, violation of the Trade Secrets Act, and injunctive relief. After the parties presented their respective cases, the circuit court held a conference with counsel. It was determined that Brock's only submission to the jury would be interference with a business opportunity. Langville and Carlson testified as fact witnesses at the trial of the 2016 case. Brock's trial counsel had previously requested consent to add "Langville and another [party] . . . as joint tortfeasors and/or co-conspirators . . . ." (R. p. 41). Respondents' joinder as indispensable parties pursuant to Rule 19 was never raised during the 2016 case. The jury found for Johnson, and Brock appealed. "[T]he sole issue determined in the 2016 case was whether Johnson, seeking leverage for his unpaid wages claim, intentionally interfered with the prospective sale of Brock CPA to a third party by publishing confidential company information in his lawsuit." (R. p. 27).

Brock filed the current civil conspiracy action against Respondents on August 3, 2018. On September 9, 2019, the circuit court dismissed Brock's action against Respondents pursuant to Rule 12(b)(7), SCRCP. In its Order of Dismissal, the circuit court found "that Plaintiff [Brock] failed to properly join Defendants in his previous action pursuant to Rule 19, S.C.R.C.P., and is therefore subject to dismissal pursuant to Rule 12(b)(7) . . . ." (R. p. 3). The language "his previous action" apparently refers to Johnson's lawsuit against Brock, the 2016 case.

STANDARD OF REVIEW

"The decision to grant or deny a motion to join an action pursuant to Rule 19, SCRCP . . . lies within the sound discretion of the trial court." *Ex parte Gov't Emps. Ins. Co.*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007); *see Marshall v. Winter*, 250 S.C. 308, 314, 157 S.E.2d 595, 598 (1967) ("Since the named parties are not necessary to a determination of the issues, whether or not they are brought in as parties to the action is ordinarily discretionary with the court."). An appellate court "will not disturb the trial court's decision absent a manifest abuse of discretion that results in an error of law." *Ex parte Builders Mut. Ins. Co.*, Op. No. 27970 (S.C. Sup. Ct. filed May 13, 2020) (Davis Adv. Sh. No. 19 at 52) (Kittredge, J.). "Moreover, the error of law must be so opposed to the trial court's sound discretion 'as to amount to a deprivation of the legal rights of the party.' " *Id.* (quoting *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 145 (2006)).

ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DISMISSING BROCK'S CIVIL CONSPIRACY ACTION AGAINST RESPONDENTS PURSUANT TO RULE 12(B)(7), SCRCP.

Summary of Argument

On August 3, 2018, Brock filed an action against Respondents alleging civil conspiracy. On September 9, 2019, the circuit court dismissed Brock's civil conspiracy action against Respondents on the grounds that Brock "failed to properly join Defendants in his previous action pursuant to Rule 19, S.C.R.C.P., and is therefore subject to dismissal pursuant to Rule 12(b)(7) . . . ." (R. p. 3). "[H]is previous action" refers to the 2016 case brought by Johnson against Brock. A 12(b)(7) motion was never made in the 2016 case and thus was waived. A proper 12(b)(7) motion was never made in the 2018 case against Respondents. Furthermore, the circuit court did not conduct the appropriate analysis under Rule 19, SCRCP. Finally, Respondents would have been joint tortfeasors in the 2016 case filed by Johnson. Even if a

proper 12(b)(7) motion had been made, "a joint tortfeasor remains merely a permissive party and joinder under Rule 19 is not required for complete relief to be accorded." *Smith v. Tiffany*, 419 S.C. 548, 564-65, 799 S.E.2d 479, 488 (2017) (Kittredge, J.).

For these reasons and the others discussed below, dismissal was improper. Brock asks this Court to reverse.

1. The "12(b)(7) motion" was improper and untimely, having been waived.

According to Rule 19(a), SCRCP,

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of his claimed interest.

Rule 19(a), SCRCP. Under Rule 19(b), "[i]f a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."

"A motion under Rule 12(b)(7) is proper where a necessary party under Rule 19 should be joined for a just adjudication of the issues" before the court. *BancOhio Nat'l Bank v. Neville*, 310 S.C. 323, 326, 426 S.E.2d 773, 775 (1993). A 12(b)(7) motion "may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." Rule 12(h)(2), SCRCP. "The rule provides an affirmative defense for the failure to join any interested party who is subject to service of process, and who will not deprive the court of jurisdiction over the subject matter under Rule 19, SCRCP." *BancOhio*, 310 S.C. at 326, 426 S.E.2d at 775.

Johnson's counsel, who is now Respondents' counsel, never asserted a 12(b)(7) defense in the 2016 case, thus waving this defense. *See Kiriakides v. Atlas Food Sys. & Serv. Inc.*, 343 S.C. 587, 596, 541 S.E.2d 257, 262 (2001) (Toal, C.J.) (citing Rule 12(h)(2), SCRCP) ("[The] defense of failure to join indispensable parties is waived if not raised at trial."). On January 22, 2019, Respondents filed a motion to dismiss the current civil conspiracy action pursuant to Rule 12, SCRCP: Purportedly, Brock's "cause of action for civil conspiracy against Defendants is an attempt . . . to retry a case that Plaintiff lost and for which [sic] Plaintiff was required to add such Defendants in the previous matter, Plaintiff is barred from bringing such claim via issue preclusion and res judicata." (R. p. 23).

In granting Respondents' Motion to Dismiss, the circuit court failed to conduct the appropriate analysis under Rule 19. "Once the defense of 12(b)(7) is asserted, the proper course for the trial court is to determine the necessity of adding a new party under Rule 19 to insure a full adjudication of the controversy." *BancOhio*, 310 S.C. at 328, 426 S.E.2d at 776; *see also Robbins v. First Fed. Sav. Bank*, 294 S.C. 219, 223, 363 S.E.2d 418, 421 (Ct. App. 1987) ("When the issue of an absent party is raised, S.C.R.C.P. 19(a) directs the court to consider whether such absence affects the interests of the absent party or those already parties to the action."); *Charleston Cnty. Parents for Pub. Sch., Inc. v. Moseley*, 343 S.C. 509, 514, 541 S.E.2d 533 (2001).

It must be noted that the circuit court did not dismiss Brock's civil conspiracy action against Respondents because Johnson could not be made a party pursuant to Rule 19(b), his absence being regarded as indispensable. Instead, the circuit court retroactively determined "that Plaintiff [Brock] failed to properly join Defendants in his previous action pursuant to Rule 19, S.C.R.C.P., and is therefore subject to dismissal pursuant to Rule 12(b)(7) . . . ." (R. p. 3). This conclusion was error.

2. As alleged joint tortfeasors, Respondents were not indispensable parties in the 2016 case filed by Johnson.

Even if a proper 12(b)(7) motion had been made at the proper time and the appropriate analysis conducted by the circuit court, Respondents, as alleged joint tortfeasors and/or co-conspirators, were not indispensable parties in the 2016 case filed by Johnson. That case involved Johnson's alleged intentional interference with a business opportunity by publishing confidential company information in his lawsuit against Brock. (R. pp. 25-29). In respect to the 2016 case, Respondents were permissive parties only.

As our Supreme Court recently concluded, "absent explicit and unmistakable legislative intent to abrogate this well-established right, a joint tortfeasor remains merely a permissive party and joinder under Rule 19 is not required for complete relief to be accorded." *Smith*, 419 S.C. at 564-65, 799 S.E.2d at 488; *e.g., Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 345, 698 S.E.2d 559, 560 (2010) ("It is well-settled that a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue."); *Doctor v. Robert Lee, Inc.*, 215 S.C. 332, 335, 55 S.E.2d 68, 69 (1949) ("To allow a defendant against the will of the plaintiff to bring in other joint tort-feasors as defendants would deny the plaintiff the right to name whom he should sue."); *S.C. Dep't of Health & Env't Control v. Fed-Serv Indus., Inc.*, 294 S.C. 33, 38, 362 S.E.2d 311, 314 (Ct. App. 1987) ("Since a joint tort-feasor is severally liable for the entire damage, complete relief can be accorded between the parties to the suit."); *cf.* James F. Flanagan, *South Carolina Civil Procedure* 154 (2d ed. 1996) ("General considerations of efficiency or convenience . . . do not require joinder under Rule 19. . . . [T]he joint-tortfeasor remains merely a permissive party in an action.").

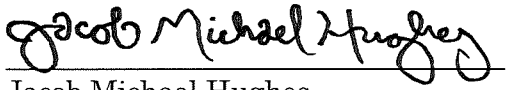
On September 9, 2019, the circuit court dismissed Brock's civil conspiracy action against Respondents. The circuit court found "that Plaintiff [Brock] failed to properly join Defendants in his previous action pursuant to Rule 19, S.C.R.C.P., and is therefore subject to dismissal

pursuant to Rule 12(b)(7) . . . ." (R. p. 3). Brock had no obligation to join Respondents in the 2016 case. Brock's trial counsel in the 2016 case did request consent to add "Langville and another [party] . . . as joint tortfeasors and/or co-conspirators." (R. p. 41). For whatever reason, this request was denied. "Thus, the sole issue determined in the 2016 case was whether Johnson, seeking leverage for his unpaid wages claim, intentionally interfered with the prospective sale of Brock CPA to a third party by publishing confidential company information in his lawsuit." (R. p. 27). Brock filed the current civil conspiracy action against Respondents on August 3, 2018. Although the circuit court did not address this issue, Brock has no obligation to join Johnson in the current action. He "may elect to sue one, some, or all [of] the joint tortfeasors." F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts* 625 (2d ed. 1997).

CONCLUSION

For the reasons above, the circuit court abused its discretion in dismissing Brock's civil conspiracy action against Respondents pursuant to Rule 12(b)(7), SCRCP. Accordingly, this Court should reverse and reinstate the case below.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Final Brief of Appellant complies with Rule 211(b), SCACR.

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