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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2020-000551

Teri Chappell, as Personal Representative of the Estate of Craig Chappell, on behalf of himself and others similarly situated, Appellant,

v.

Ladles Soups – James Island LLC; Ladlessoups, LLC; Ladles Soups At Cane Bay LLC; Ladles Soups At Citadel Mall LLP; Ladles Soups Calhoun LLC; Ladles Soups Cane Bay LLC; Ladles Soups Coosaw LLC; Ladles Soups Downtown Charleston, LLC; Ladlessoups Fresh Fields, LLC; Ladles Soups @ Freshfields Village, LLC; Ladlessoups Mainstreet, LLC; Ladles Soups Moncks Corner LLC; Ladlessoups Mount Pleasant, LLC; Ladles Franchise Development, LLC; Ladles Franchising Inc.; Ladles Fort Mill, LLC; Ladles Knightsville LLC; Ladles West Ashley; Teri Owens; Sue Allen, Tracy Allen, Steve Traeger, Erik Dyke, Julie Dyke, Stan Sutton, Carol Sutton, Jason Dalter, Kellie Henderson; Jane Doe 1-25 (Unknown Operating Company and Management Company Owners); John Doe 25-40 (Management Personnel), Defendants,

Of Which Ladles Soups Coosaw LLC, Ladles Soups Downtown Charleston, LLC, Traeger Unlimited dba Ladlessoups Fresh Fields, LLC, Ladles Soups @ Freshfields Village, LLC, Ladles Soups Moncks Corner LLC, Ladles Franchise Development, LLC, Ladles Fort Mill, LLC, Ladles Knightsville LLC, Ladles West Ashley, Steve Traeger, Stan Sutton, Carol Sutton, and Kellie Henderson are the Respondents.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in his opening brief, Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondents.

As an initial matter, Appellant's Suggestion of Death was filed in this appeal on October 27, 2020. Appellant's sister, Teri Chappell, has been named personal representative for Appellant's estate. After being named personal representative for Appellant's estate, a motion for substation of party was filed on December 17, 2020, pursuant to S.C. App. Ct. R. 265 (b). The motion was Granted on January 7, 2021.

Also as an initial matter, Respondents inexplicably assert in their Initial Brief that Appellant's August 23, 2019 Requests to Admit were served by email "and those email addresses were not correct addresses." (Resp. Int. Brf. at p. 2, top line). First, Respondents provide no basis for this assertion. The Requests to Admit were served on counsel for Respondents at the following email addresses: Paul B. Ferrera, III - paul@ferraralawfirm.net; Janel K. Ferrara - janel@ferraralawfirm.net; and Jessica Weiss - j.weiss@ferraralawfirm.net. (R. p. 0490; Mot. to Deem Requests Admitted, Ex. B). At the time that the Requests to Admit were served, these attorney email addresses are exactly as listed in AIS, which all South Carolina attorneys are required to maintain and must be updated annually. (R. pp. 0491-0497; Mot. to Deem Requests Admitted, Ex. C). *Significantly, the email address listed above is exactly as provided by Respondents' counsel in the signature block for his Initial Brief!* Second, and perhaps more importantly, the unsupported assertion that Respondents are now making in their Initial Brief for the very first time is clearly, on its face, in direct contradiction to the assertion made by counsel for Respondents to the trial court at the January 6, 2020 hearing. Respondents clearly represented to the trial court that the Requests for Admission were received by email:

> MR. FERRARA: . . .. My office – the associate in my office, Alex, who is no longer with me, assumed that that was as to Ladles Corporate which they answered. Mr. Shelbourne also answered. But, respectfully, at that time, we didn't have electronic filing and there was never a hard copy mailed upon me and never served upon me. **It was just e-mailed to me.**

(R. p. 0798, ll. 15-22; R. pp. 0798-0799; Hr'g Tr. at p. 54, ll. 15-22; p. 54-55)(emphasis added).

I. APPELLANT DID NOT HAVE A FULL AND FAIR OPPORTUNITY TO CONDUCT DISCOVERY AND THIS ISSUE WAS PROPERLY PRESERVED FOR APPEAL

The notice of appeal in a case appealed from the Court of Common Pleas must be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment. Rule 203(b)(1), SCACR; *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 14, 602 S.E.2d 772 (S.C. 2004). A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion. See Rule 203(b)(1), SCACR; Rules 50(e), 52(c), and 59(f), SCRCP; *Elam* 361 S.C. at 15.

Respondents assert that no request for judicial review has been made by Appellant with regard to the trial court's order to compel of January 7, 2020. However, the trial court's January 7, 2020 order *granted* Appellant's Motion to Compel and retained jurisdiction over the case for discovery purposes with regard to Appellant's subpoena to the South Carolina Department of Employment and Workforce ("SCDEW"). (R. pp. 0007-0009; R. pp. 0355-0433; R. pp. 0472-0478; 1/7/20 Order granting App.'s Mot. to Compel; App.'s Amended Mot. to Compel; App.'s Subpoena to SCDEW). The Order did not deny any portion of Appellant's motion. *Id.* (R. pp. 0007-0009) Notably, Appellant's Amended Motion to Compel, which was the motion before the trial court, specifically requested that because over 120 days had passed without response, the trial

court "find that Defendants have waived objections to all such requests due to its [sic] failure to provide these discovery responses." (R. p. 0358; App.'s Amd. Mot. to Compel at p. 2).

Despite the trial court's January 7, 2020 Order granting Appellant's Motion to Compel, Respondents failed to supplement responses for the franchisee parties or respond at all for at least one, Ladles Downtown[1]. On February 11, 2020, the trial court granted Respondents' Motion for Summary Judgment. On February 21, 2020, Appellant filed his Motion to Reconsider raising again the issue of Respondents' failure to supplement their discovery responses or respond at all prevented Appellant from having a full and fair opportunity to conduct discovery. (R. pp. 0638-0643; App.'s Mot. to Recon. at pp. 3-8). This motion specifically addresses Respondents' failure to provide supplemental responses or respond at all and cites the trial court's January 7, 2020 Order granting Appellant's Motion to Compel. *Id.* R. p. 0639; at p. 4. Respondents did not file a response in opposition to Appellant's motion. The trial court denied Appellant's Motion to Reconsider on February 25, 2020 without addressing Appellant's arguments regarding its Order granting Appellant's Motion to Compel.

Even assuming Appellant's Motion to Compel with regard to Respondents was denied, this appeal is Appellant's first opportunity to raise the issue. An appeal ordinarily may be pursued only after a party has obtained a final judgment. *Id.*; S.C. Code Ann. 14-3-330; Rule 72, SCRCP; Rule 201(a), SCACR. 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. *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. at 6, 630 S.E.2d at 467. Absent a specialized statute, an order must fall

[1] Appellant's Initial Brief raised the issue of Respondents incorrectly stating at the January 6, 2020 hearing that "Your Honor, I will represent as an officer of the court, my office as of last Friday has answered all of the discovery of all the defendants that I represent." (App.'s Int. Brf. at p. 16; R. p. 0788, ll. 12-15; Hr'g Tr. at p. 44, ll. 12-15). No responses were ever provided for Ladles Downtown. Respondents not only failed to address this assertion in their Initial Brief, they repeated the incorrect claim that Respondents answered all written discovery. (Resp. Int. Brf. at p. 9).

into one of several categories set forth in Section 14-3-330 in order to be immediately appealable. *Id.* Courts in South Carolina have generally held that orders denying or compelling discovery are interlocutory and not directly appealable under section 14-3-330. *See, e.g., Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986); *Patterson v. Specter Broadcasting*, 287 S.C. 249, 335 S.E.2d 803 (1985); *Lowndes Products, Inc. v. Brower*, 262 S.C. 431, 205 S.E.2d 184 (1974). Respondents provide no support for their contention that discovery issues that were properly raised cannot be reviewed by this court in connection with an appeal from the final judgment.

To the extent that the trial court's January 7, 2020 order denied Appellant's Motion to Compel as to Respondents, their argument that discovery issues are being raised for the first time on appeal has no merit. Appellant raised to the trial court the issue of not having the opportunity to fully and fairly conduct discovery due to Respondents' failure to respond to discovery ad nauseum. (R. p. 0771, ll. 13-17; R. pp. 0514-0518; R. pp. 0638-0643; Hr'g Tr. p. 27, ll. 13-17; App.'s Memo in Opp. to MSJ at pp. 7-11; App.'s Mot. to Recon. at pp. 3-8).

Respondents' argument that Appellant failed to move for a continuance also misses the mark. Where an argument is neither clearly preserved nor clearly unpreserved, courts should resolve this dispute "in favor of preservation." *Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018). Additionally, where confusion arises over the nature of a motion, the issue can be preserved despite failure to raise it at the initial hearing. *State v. Williams,* 417 S.C. 209, 229-30, 789 S.E.2d 582, 593 (Ct. App. 2016). This case was transferred to the Jury Trial Roster on August 20. 2019. (R. p. 0237; App.'s Mot. for Continuance at p. 3). On August 22, 2019, Appellant filed a motion requesting that that matter be continued such that the case not be called to trial before April 13, 2020 because Respondents had failed to respond to Appellant's discovery requests and were over 90 days late. *Id.* The trial court denied Appellant's motion. (R.

pp. 0007-0009; 1/7/20 Order). This appeal is Appellant's first opportunity to raise the issue. *Townsend v. Townsend*, 323 S.C. 309, 312, 474 S.E.2d 424, 427 (1996) (denial of motion for a continuance is an interlocutory order not affecting the merits, and thus is reviewable only on appeal from a final order). Although Appellant's motion requested a continuance of the trial date for discovery purposes, the issue of Appellant seeking a full and fair opportunity to conduct discovery was squarely before the court and the issue should be preserved.

Respondents make the same argument regarding Appellant's Motion to Deem Admitted Requests for Admission. (Resp.'s Int. Brf. at p. 12). Appellant raised the issue of the court's denial of his Motion to Deem Admitted Requests for Admission in his Response in Opposition to Respondents' Motion for Summary Judgment, at the hearing, and in Appellant's Motion to Reconsider. (R. pp. 0639-0640; Mot. to Recon. at pp. 4-5). Appellant properly raised the issue before the trial court and it should be preserved for appeal. S.C. Code Ann. 14-3-330. *Ex parte Capital U-Drive-It, Inc.*, at 6, 630 S.E.2d at 467.

Respondents cite *Watkins v. Hodge* in support of their argument that Appellant failed to timely appeal the trial court's order denying his Motion to Deem Admitted Requests for Admission. However, *Watkins* deals with an order overruling a demurrer which is immediately appealable unlike Appellant's motion on his requests for admission. *Watkins v. Hodge,* 232 S.C. 245, 247, 101 S.E.2d 657, 658 (1958); *See also Hammond v Port Royal & Augusta R. Co.*, 15 SC 10 (1880) and *National Exch. Bank v Stelling*, 32 SC 102, 10 SE 766 (1889) (holding that an appeal from an order overruling a demurrer to the complaint because it did not state facts sufficient to constitute a cause of action, stayed further proceedings below during the pendency of the appeal); *Elliott v Pollitzer*, 24 SC 81 (1885) and *McCown v McSween*, 29 SC 130, 7 SE 45 (1887) (holding that an order overruling an oral demurrer is an order involving the merits and hence reviewable.);

Miles v. Charleston Light & Water Co., 87 S.C. 254, 69 S.E.2d 292 (S.C. 1910) (holding that an order on demurrer to a complaint, which in effect strikes out a portion thereof, is an order affecting a substantial right.); *Meadors v. South Carolina Medical Ass'n*, 266 S.C. 391, 223 S.E.2d 600 (S.C. 1976) (holding that an order overruling a demurrer on the ground that it fails to state a cause of action is one "involving the merits."); *Crotts v. Fletcher Motor Co.* (S.C. 1951) 219 S.C. 204, 64 S.E.2d 540 (S.C. 1951) (holding that an interlocutory appeal may be taken to Supreme Court from an order overruling a demurrer, but failure to make or perfect such an appeal does not affect right of Supreme Court to review matter in connection with an appeal from the final judgment.).

II. APPELLANT'S DEATH DOES NOT RENDER HIS CLASS ACTION CLAIMS MOOT

"Causes of action for and in respect to ... any and all injuries to the person or to personal property shall survive both to and against the personal or real representative... of a deceased person ... any law or rule to the contrary notwithstanding." S.C.Code Ann. § 15-5-90. Generally, any cause of action which could have been brought by the deceased in his lifetime survives to his representative. *Layne v. International Bhd. of Elec. Workers,* 271 S.C. 346, 247 S.E.2d 346 (1978). The statute contains no language that suggests class action causes of action brought under the SCPWA or for conversion or breach of contract would not survive the death of a person to whom the action has accrued.

Respondents cite a Second Circuit federal case from 1980, *Swan v. Stoneman*, seemingly for the proposition that other plaintiffs must intervene before the death of a fellow plaintiff to prevent a class action from being rendered moot. *Swan v. Stoneman*, 635 F.2d 97 (2d Cir. 1980). However, that appears to be a misunderstanding of that case and its holding. Plaintiff Swan filed a class action lawsuit against defendant for violation of the Rehabilitation Act of 1973 and three other plaintiffs subsequently filed a motion to intervene because they claimed they had identical claims

as Swan. Swan died while his motion for class certification and the motion to intervene were pending. After Swan's death, the defendant moved to dismiss on the grounds that Swan's death rendered his action moot and that both Swan and the proposed intervenors failed to exhaust their administrative remedies under the Act. The trial court heard the motion for class certification and denied class certification and dismissed Swan's claim on the ground that "there had been no motion to substitute Swan's representative as a party . . .." *Id.* at 101. Ultimately, the appeal in this case did not challenge the dismissal as to Swan and the Second Circuit ruled on other grounds. *Id.* at 102, 105-106.

Respondents also cite *Ferguson v. Charleston Lincoln Mercury* for the proposition that the essential elements required of S.C.R.C.P. Rule 23 cannot be met where the death of a single named class member dies prior to class certification. *Ferguson v. Charleston Lincoln Mercury,* 564 S.E.2d 94, 349 S.C. 558 (S.C. 2002). However, *Ferguson* only provides that "the suit becomes moot, *unless* a suitable plaintiff intervenes and satisfies the requirements of Rule 23 SCRCP." *Ferguson* at 94, 349 S.C. at 566. (Emphasis added). Appellant's Suggestion of Death was filed on October 27, 2020. Appellant's sister, Teri Chappell, has been named as personal representative for Appellant's estate. Upon being named personal representative for Appellant's estate, a motion was filed to substitute Ms. Chappell as personal representative for Appellant's estate pursuant to S.C. App. Ct. R. 265(b). The motion was Granted on January 7, 2021. Ms. Chappell can properly be substituted for Appellant's claim because as noted above, any cause of action which could have been brought by the deceased in his lifetime survives to his representative. *Layne v. International Bhd. of Elec. Workers,* 271 S.C. 346, 247 S.E.2d 346 (1978); S.C.Code Ann. § 15-5-90.

Respondent's argument that the essential elements required of S.C.R.C.P. 23 cannot be met is premature as that issue is not before this Court. The trial court denied Appellant's Motion for

Class Certification *without prejudice* leaving open the opportunity for class certification at a later date: "Plaintiffs' motion for class certification just to be dispositive, you can bring the motion back at a later date, but currently I'm denying that motion." (R. p. 0795, l. 23 – R. p. 0796, l. 1; Hr'g Tr. at p. 51, l. 23 – p. 52, l. 1). First, whether or not Appellant's sister could meet the essential elements of SCRCP Rule 23 is not currently before this court and her qualifications as a class representative can be addressed with a subsequent motion for class certification if summary judgment is reversed. Moreover, the conclusory argument of Respondents that merely assumes that Ms. Chappell cannot meet the Rule 23 requirements is unpersuasive because the specific wording of Rule 23(a)(4) only requires that the representative "fairly and adequately protect" the interests of the class. SCRCP Rule 23(a)(4). Respondents provide no basis to claim that Ms. Chappell could not meet this requirement and her ability to do so can properly be reviewed by the trial court in a subsequent motion for class certification. Second, one of Appellant's arguments for reversal of summary judgment is that Appellant did not have an opportunity to fully engage in discovery on pre-certification issues, specifically with regard to discovery relating to identification of Respondents' employees. If summary judgment is reversed, Appellant would necessarily be permitted to engage in further discovery on class certification issues as well as have an opportunity to add class representatives upon motion to the trial court.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse the trial court's decision to grant Respondents' Motion for Summary Judgment. The trial court's grant of summary judgment was premature because Appellant did not have a full and fair opportunity to complete discovery. Appellant had statutory standing to bring his claims against Respondents

because they were engaged in a common scheme with other Ladles defendants that damaged Appellant. Appellant also has constitutional standing to bring his claims against Respondents for conversion.

March 23, 2021

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this *Final Reply Brief of Appellant* complies with Rule 211(b), SCRAP.

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