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. 2020-000201

Terri Chappell, 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; Ladlesoups 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),

Of which Ladlessoups Mount Pleasant, LLC, Erik Dyke and Julie Dyke are the Respondents.

AMENDED FINAL REPLY BRIEF OF APPELLANT

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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, Respondents allege in their Statement of the Case that Appellant's allegation that he "encountered substantial challenges in getting all of the defendants served." was not presented to the trial court or supported by the record. (Resp. Br. at p. 3). This is incorrect. Appellant presented this issue to the trial court in its Memo in Opposition to Summary Judgment. (R. p. 253; Memo in Opp. at top of p. 4). Respondents also allege that Respondents' 30(b)(6) deposition was not presented at all to the trial court. (Resp.'s Br. at p. 3, fn. 1). Again, this is incorrect. At the hearing, counsel for Respondents presented testimony from the 30(b)(6) deposition of Julie Dyke[1]: ""[t]hey took Mr. and Mrs. Dyke's deposition and that is not what they said. They said they do turn over the tips, the credit card tips, through a bonus program to the employees." (R. p. 405, ll. 19-24; Hr'g Tr., at p. 11, ll. 19-24).

I. APPELLANT SHOWED GENUINE ISSUES OF MATERIAL FACT FOR TRIAL

Respondents cite cherry-picked testimony from Appellant's deposition to support their claim that no genuine issue of material fact was presented to the trial court. (Resp. Br. p. 4). Respondents cite testimony purporting to show that Appellant knew of no reason to include Respondents in the lawsuit because Ladles Mt. Pleasant paid credit card tips to their employees. *Id.* However, as follow-up testimony at the same deposition reveals, the entire basis for Appellant testifying to that was the mistaken belief that the Town of Mt. Pleasant has its own ordinance requiring employers to pay its employees credit card tips:

[1] Respondents incorrectly stated to the trail court that Erik Dyke's deposition was taken.

> And like I said, it [sic] was told by Logan, again, that they're [Ladles Mt. Pleasant] the only ones that were allowed to get charge tips, for some city ordinance.

(R. p. 371, ll. 8-11; C. Chappell Depo. at p. 45, ll. 8-11).

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Id.*

Significantly, the Town of Mt. Pleasant does not have any ordinance or regulation requiring employers to pay credit card tips to employees and Appellant's testimony was based solely on the mistaken belief that it did. Perhaps even more significant is the representation made by Respondents' counsel at the hearing that "[t]hey took Mr. and Mrs. Dyke's deposition and that is not what they said. They said they do turn over the tips, the credit card tips, through a bonus program to the employees."[2] (R. p. 405, ll. 19-24; Hr'g Tr., at p. 11, ll. 19-24). Appellant's complaint alleges that tips are wages that belong to the employees under the South Carolina Payment of Wages Act ("SCPWA"). (R. pp. 030-031; Compl at pp. 14-15). The SCPWA provides that an employer shall not "withhold or divert" **any** portion of any employee's wages unless required or permitted by federal or state law "or the employer has given written notice of the

[2] As noted in Appellant's Initial Brief, despite being requested by Appellant, Ladles Mt. Pleasant never produced any material indicating how or whether credit card tips were paid to its employees. That the existence of Respondents' "bonus program" was not revealed until the hearing on their Motion for Summary Judgment through *uncited deposition testimony* only underscores the fact that Appellant did not have a "full and fair opportunity to complete discovery" as discussed further in Section II of this Reply. *Baughman v. Am. Tel. & Tel. Co.,* 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991).

amount and terms of the deductions as required by Subsection A of 41-10-30."[3] S.C. Code Ann. § 41-10-40 (C) (emphasis added). It can be reasonably inferred that paying credit card tips through a bonus program is not the same as paying all employees all of the credit card tips owed to them. Withholding credit card tips from employees in order to distribute them as a bonus is a violation of the SCPWA as alleged in Appellant's complaint, and part of the same policy or scheme of withholding credit card tips common among all of the Ladles defendants.

Additionally, Respondents ignore that the deposition testimony of every other Ladles location taken prior to the hearing, including testimony of the founding franchisor who Respondent Julie Dyke previously worked for at multiple locations and learned the business from, confirmed that they all practiced a policy of withholding credit card tips from their employees. (R. p. 376. ll. 20-25; R. p. 377, ll. 1-18; Teri Owens Depo. at p. 25, ll. 20-25; p. 27, ll. 1-18; R. p. 379, ll. 1-16; R. p. 380, ll. 3-5; Corey Paul Depo. at p. 32, ll. 1-16; p. 37, ll. 3-5; R. p. 393, ll. 6-25; R. p. 394, ll. 1-2; Suzie Allen Depo. at p. 21, ll. 6-25; p. 22, ll. 1-2). Again, it could be reasonably inferred from the fact that Julie Dyke learned the Ladles business by working at multiple Ladles locations with a policy of withholding credit card tips that when she opened her own Ladles location it would have the same policy. This is particularly the case when Respondents failed to provide any material indicating otherwise in response to Appellant's discovery requests seeking information relating to "salary payments, tips, wages." (R. p. 102; RFP No. 23).

The evidence that was before the trial court including all the inferences that could be reasonably drawn from it and viewed in the light most favorable to Appellant, created a genuine

[3] "Every employer shall notify each employee in writing at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, and the deductions which will be made from the wages, including payments to insurance programs. The employer has the option of giving written notification by posting the terms conspicuously at or near the place of work. Any changes in these terms must be made in writing at least seven calendar days before they become effective. This section does not apply to wage increases." S.C. Code Ann. § 41-10-30 (A).

issue of material fact as to whether Ladles Mt. Pleasant withheld credit card tips from its employees in violation of the SCPWA.

II. APPELLANT RAISED THE ISSUE OF HIS PENDING MOTION TO COMPEL AND THE NEED TO COMPLETE DISCOVERY IN HIS MEMO IN OPPOSITION TO SUMMARY JUDGMENT AS WELL AS AT THE HEARING AND THE COURT RULED ON IT

Respondent's argument that Appellant did not raise the issue of the need to complete discovery at the hearing is without merit. Appellant raised the issue of his pending Motion to Compel in his Memo in Opposition multiple times. (R. pp. 252-253; Memo in Opp. at p. 3 and p. 4). More specifically, a fundamental basis of Appellant's opposition to Respondents' Motion for Summary Judgment was that it was premature because Respondents had not fully responded to Appellant's discovery requests. (R. pp. 258-259; Memo in Opp at pp. 9-10). With regard to Respondents' objection to Appellant's request for the identities of its tipped employees, Appellant argued: "These employees are witnesses to the facts of the case . . . . Here, it is particularly important that Plaintiff have the opportunity to conduct its own investigation because management for at least one Ladles restaurant location has instructed its employees to be deceptive to customers who inquire about who gets paid credit card tips." *Id.* The obvious assertion here is that this information needs to be provided before the Court can grant summary judgment and the Court ruled that it did not. (R. pp. 009-010; Order at pp. 4-5).

Appellant raised the issue again at the hearing and detailed specific discovery responses that were outstanding and why the responses were necessary before a ruling that granted summary judgment could be made. (R. p. 402, ll. 13-25; Hr'g Tr., at p. 8, ll. 13-25). At the hearing Appellant even raised the issue that discovery from other parties was still pending and that these responses were necessary before a ruling on summary judgment could be made. (R. p. 403, ll. 11-17; *Id.* at p. 9, ll. 11-17). Likewise, the Court devoted a substantial portion of its Order ruling that Appellant

did have enough time to conduct discovery and that further discovery would not uncover additional relevant evidence or create a genuine issue of material fact. (R. pp. 009-010; Order at pp. 4-5). What more was there for the trial court to rule on this issue?

Upon review of all of the cases cited by Respondents in their brief, it is not clear whether the appellants in those cases raised the issue of discovery in any manner for the purpose of preserving the issue for appeal. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.,* 368 S.C. 342, 628 S.E.2d 902, 919 (Ct. App. 2006). Any lack of precision in the terminology used by Appellant in this case should not negate the preservation of the issue as the trial court clearly understood the purpose and substance of Appellant's argument. Instead of granting a continuance on hearing Respondents' motion, the Court could have denied the motion without prejudice allowing Respondents to bring the motion again after further discovery had taken place. It is clear from the record that this was the purpose and substance of Appellant's arguments relating to the issue of discovery.

In their Response, Respondents further argue that even if the issue was preserved, the trial court was still correct in granting summary judgment because Appellant had enough time to conduct discovery and failed to advance a good reason why further discovery would uncover additional relevant evidence and create a genuine issue of material fact. (Resp. Br. at p. 8). This is a mischaracterization of Appellant's argument. The hearing on Respondents' motion did not take place until October 29, 2019. Appellant was requesting responses to discovery requests that had already been served five months earlier on May 24, 2019. Notably, these requests were served on

Respondents prior to the filing of their Motion for Summary Judgment on May 28, 2019. (R. pp. 078-082; Mot for Summary Judgment).

Like the trial court's Order, Respondents cite *Guinan* to support their argument that Appellant had a full and fair opportunity to complete discovery. *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, ___, 677 S.E.2d 32, 36 (Ct. App. 2009). Critically though, in *Guinan*, unlike here, the discovery deadlines had already expired. *Id.* In the present case, no scheduling order had ever been filed, much less discovery deadlines, which is why Appellant had submitted a proposed scheduling order that was the subject of an upcoming status conference. (R. p. 253; Memo in Opp at p. 4). Much of Respondents' brief emphasizes a phantom discovery deadline that did not exist in this case.

Respondents also argue that Appellant failed to demonstrate to the trial court how having the names of Respondents' employees or payroll records would establish a policy of inappropriate wages. (Resp. Br. at p. 11). This argument is without merit. As the trial court acknowledged at the hearing, "So the basis of the complaint is simply just a wage issue? I mean its improper wage I guess." (R. p. 400, ll. 14-15; Hr'g. Tr. at p. 6, ll. 14-15). The fundamental issue in this case is whether Ladles Mt. Pleasant withheld their employees credit card tips in violation of the SCPWA. Yet, despite this being a SCPWA case and despite Appellant's requests, Respondents did not produce any payroll records or any documents showing that they paid their employees credit card tips. This issue was properly placed before the trial court in Appellant's Memo in Opposition as well as at the hearing. (R. pp. 258-259; Memo in Opp. at p. 9-10; R. p. 402, ll. 13-25; R. p. 403, ll. 1-10; Hr'g. Tr. at p. 8, ll. 13-25, p. 9., ll. 1-10). Respondent argues that payroll information would not necessarily address tips paid to employees or a policy. (Resp. Br. at p. 11). However, documents confirming whether or not Respondents were paying their employees credit card tips

would obviously be an indication as to what their policy is on the subject. It is inconceivable that Appellant's RFP No. 23 requesting records "relating to salary payments, tips, wages, employment tax records since January 1, 2015" would not address tips paid to employees or a policy. Again, this specific discovery request and the explanation as to how this information could establish a policy of withholding credit card tips in violation of the SCPWA was properly before the trial court. (R. p. 402, ll. 20-25; Hr'g Tr. at p. 8, ll. 20-25; R. p. 259; Memo in Opp at p. 10). Second, as discussed in Appellant's initial brief, tips are wages under the SCPWA[4]. If Respondents' payroll records did not indicate the payment of credit card tips, that would create a genuine issue of material fact as to whether Ladles Mt. Pleasant was in violation of the SCPWA[5]. All of the material sought by Appellant was in the sole possession of Respondents and Appellant had no other way to obtain it.

In *Lanham,* Blue Cross moved for summary judgment and in response, Lanham filed a notice of taking the deposition of Blue Cross, and served requests for production of information that was in the sole possession of Blue Cross. *Lanham v. Blue Cross and Blue Shield,* 349 S.C. 356, 362, 563 S.E.2d 331, __, (S.C. 2002). Blue Cross responded with a motion for protective order or to quash and Lanham moved to compel. *Id* at 363. The trial court declined to rule on Lanham's motion to compel and granted Blue Cross summary judgment. *Id.* The South Carolina Supreme Court found that without being able to conduct further discovery, there was no way for Lanham to respond to Blue Cross' claim that Lanham's failure to disclose a pre-existing condition

[4]*See Carbone v. Zen* 333 Inc., No. 2:16-CV-0108-DCN, 2016 WL 7383920, at *4 (D.S.C. Dec. 21, 2016) (holding that tips constitute wages under the SCPWA); *Degidio v. Crazy Horse Saloon & Rest., Inc.*, No. 4:13-CV-02136-BHH, 2016 WL 3125467, at *5 (D.S.C. June 3, 2016) (same); *Gardner v. Country Club, Inc*., No. 4:13-CV-03399-BHH, 2016 WL 3125469, at *5 (D.S.C. June 3, 2016); S.C. Code Ann. § 41-10-10 (2).

[5] Further, if the payroll records do not indicate payment of credit card tips despite them being paid, that in itself is still a violation of Section 40-10-30 (B) and (C) of the SCPWA requiring employers to provide employees an itemized statement of gross pay and deductions.

was material to its decision to offer coverage. *Id.* It further found that given the information sought by Lanham was in the sole possession of Blue Cross, the trial court erred in ruling on the summary judgment motion without first ruling on Lanham's motion to produce and motion to compel. *Id.*

Here, the facts are even more favorable to Appellant than they were to the plaintiff in *Lanham* where summary judgment was reversed. Unlike in *Lanham,* where the plaintiff waited until after the motion for summary judgment was filed to seek discovery, Appellant served his discovery requests on Respondents prior to their Motion for Summary Judgment being filed. Additionally, unlike in *Lanham,* where the plaintiff was seeking *further* discovery, Appellant was seeking responses to his original discovery requests. Finally, *but like* the plaintiff in *Lanham,* Appellant was unable to fully respond to Respondents' Motion for Summary Judgment due to their refusal to produce information in their sole possession that was vital to Appellant's claims. It should also be noted that in *Lanham,* the South Carolina Supreme Court found that the trial court erred in ruling on the summary judgment motion without first ruling on Lanham's motion to produce and motion to compel. *Id.* In making its finding, the Court in *Lanham* determined that counsel's representation to the court that Lanham was in need of further discovery sufficient. *Id.* at fn. 1.

III. APELLANT RAISED THE ISSUE OF APPELLANT'S PENDING MOTION FOR CLASS CERTIFICATION AND THAT ISSUE IS PRESERVED FOR APPEAL

Respondents argue that the issue of Appellant's pending Motion for Class Certification was not preserved for appeal. Respondents are simply wrong on this point. The very first argument Appellant makes in his Memo in Opposition to Summary Judgment was that "Defendant's Motion for Summary Judgment is premature because Plaintiff's Motion for Class Certification is still pending." (R. p. 255; Memo in Opp. at p. 6). In fact, Appellant specifically argued in his Memo that Respondents' arguments in support of its Motion for Summary Judgment

were misplaced because of Appellant's class action allegations and that a grant of summary judgment "while Plaintiff's Motion for Class Certification is still pending is premature and, therefore, should be denied." (R. p. 258; Memo in Opp. at p. 9). Also, a copy of Appellant's Motion and Memo in Support of Class Certification was attached as an exhibit to Appellant's Memo in Opposition. (R. pp. 284-354; Memo in Opp. at Ex. C). Further, the issue of Appellant's Motion for Class Certification was raised at the hearing and the trial court was made aware of the details of the pending motion. (R. p. 403, ll. 18-25; R. p. 404, ll. 1-18; Hr'g. Tr. at p. 9, ll. 18-25; p. 10, ll. 1-18). Finally, the Court specifically made a ruling on the issue of Appellant's pending Motion for Class Certification at the hearing and opted not to rule on it stating that "[i]f you get it certified as a class, it will change things." (R. p. 407, l. 25; R. p. 408, ll. 1-2; Hr'g. Tr. at p. 13, l. 25, p. 14, ll. 1-2). There simply is no basis for Respondents' claim otherwise. Appellant's pending Motion for Class Certification was properly before the trial court through Appellant's Memo in Opposition (R. pp. 284-354; including attachment of the Motion for Class Certification and supporting memo) as well as oral argument at the hearing and the trial court specifically opted not to rule on it.

CONCLUSION

For the reasons stated above, as well as those stated in Appellant's Initial Brief, Appellant respectfully requests that this Court reverse the trial court's decision to grant Respondents' Motion for Summary Judgment and remand to the trial court for further proceedings.

December 7, 2020

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

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