THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL from Court of Common Pleas of CHARLESTON COUNTY

Capers G. Barr, III, Special Referee

Appellate Case No. 2021-000185

Case No. 2019-CP-10-03042

Judith A. Brown, as Personal Representative for the Estate of Mildred C. Knight, and Norman R. " Bobby" Knight III, ...Appellants

v.

Chloe Knight Tonney, ...Respondent

APPELLANTS' REPLY BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

1. MAY APPELLANTS AMEND THEIR ORIGINAL COMPLAINT TO INCLUDE TWO ADDITIONAL CAUSES OF ACTION WHERE THE ORIGINAL COMPLAINT WAS FILED IN 2005 AND NEVER TRIED?

2. IS DENIAL OF APPELLANTS' MOTION TO AMEND THEIR COMPLAINT TO ADD CAUSES OF ACTION IMMEDIATELY APPEALABLE?

STATEMENT OF THE CASE

Appellants moved to amend their original complaint pursuant to SCRCP 15(a) and 15(c).(R.p.). The objective of the amendments was to include two additional causes of action: conspiracy and loss of consortium. The loss of consortium claim was offered as an amendment by the Decedent, Mildred C. Knight, pro se, and withdrawn by her acting pro se at a hearing in April, 2008 in response to motions filed by Respondent counsel. (Trp:8/26/20:p.17;p.25). The conspiracy cause was offered in 2019 for the first time with the re-offer of the consortium amendment. The present action was commenced in June, 2019 and consolidated with the original action that started in 2005. These parties are still involved with probate matters involving the estates of Norman R. Knight, Jr. and Mildred C. Knight.

These amendments comprise the conduct, transactions, or occurrences that gave rise to the 2005 litigation.

The 2005 action became a 2008 case after earlier administrative consolidation and was inadvertently dismissed in 2009 and restored in 2019 (SCRCP 40) and consolidated with the 2019 action filed by the Personal Representative of the Estate of Mildred C. Knight and Norman R. "Bobby" Knight, III, sole surviving devisee of the Knight Estate. The Special Referee denied the motion to amend the June 2019 complaint. (R.p.)

STANDARD OF REVIEW

Amending Pleadings

The focal inquiry in allowing amendment of pleadings is whether doing so will prejudice the opposing party. Pool v. Pool, 329 S.C. 324, 328, 494 S.E.2d 820, 822 (1998).

It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice. Foggie v. CSX Transportation Inc., 315 S.C. 17, 22, 431 S.E. 2d 587, 590 (1993).

Appealability

An order denying a motion is not appealable before final judgment in any respect in which it does not deprive the movant of a substantial right. Marshall v. White, 250 S.C. 308, 157 S.E.2d 595 (1967).

ARGUMENT

1. RULES 15(a) AND 15 (c) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE ALLOW THE PROPOSED AMENDMENT

The circumstances of this case establish the propriety of allowing the proposed amendment. The original matter was restored to the active general docket. The subject amendment was proposed by motion shortly thereafter. All of the facts introduced are contemporaneous, consistent, conduct related to the original claim, and the relationship of the parties. The fundamental contest is a family dispute involving two daughters versus the parents and a brother. The proposed amendment offers allegations and claims that include the entire saga of this conflict and nothing the Respondent is uninformed or surprised by and all legally contemporaneous to the original action.(Trp:. 8/26/20:p. 16-17) Respondent and the Special Referee offered no element of prejudice.

The Respondent merely declared that the additional claims were not

related to the cause of action to recover the property. If the Appellants did not desire to pursue the other claims that would be a matter of desecration; however, the entire conflict includes the additional claims. It is the responsibility of a party opposing an amendment to establish prejudice. Forrester v. Smith & Steele Builders, 295 S.C. 504, 508,369 S.E. 2d 156, 158 (Ct. App. 1988). The purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations. Thomas v. Grayson, 318 S.C. 82,456 S.E. 2d 377,380 (1995). This maxim expressed by the Thomas holding is solid South Carolina jurisprudence and a rule of law, because it clearly tracks the Rule 15(c) requirements: " Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." Rule 15(c), SCRCP, See, Krupski v. Costa Crociere,S.p.A, 560 U.S. 538,130 S. Ct. 2485, 177 L. Ed. 2d 48 (2010)(the issue of undue delay is not persuasive in an evaluation of 'relation back' under Rule 15(c)). South Carolina's Rule 15(c) is the same as the Federal Rule. See, Notes, Commentary, Rule 15(c), SCRCP. There must be prejudice to the nonmoving party in order to sustain a denial of a Rule 15 amendment otherwise satisfactory to the Rule. Patton v. Miller, 420 S.C. 471,493, 804 S.E. 2d 252,263 (2017).

Delay is not futility. Delay is not prejudice per se. There is no delay in this case because the litigants, in one forum or another, have been in contention for nearly 18 years concerning the same issues. The loss of consortium claim was offered in 2008, it was not heard because the pro se litigant (Mildred Knight) withdrew from the argument, at a hearing on the motion. Notwithstanding the pronouncement of a broader standard, Patton and Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L. Ed.2d 222(1962), i.e. in the absence of any apparent or declared reason... the leave sought should, as the rule requires, be "freely given."

Whether the opponent declares undue delay, bad faith or dilatory motive on the part of the movement, 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, the grant of the amendment must be weighed by the kind of disadvantage created for the party opposing the amendment. As in Patton, the Special Referee, denied the motion to amend the complaint on his perception of the merits of the amended claims, not under the criteria for amendment a court is required to consider under Rule 15(a). Patton, 420 S.C. 490, 804 S.E. 2d 262 (2017).

At the hearing on November 24, 2020, Appellants objected to Respondent's attachment because they were not complying with the Special Referee's directions on the submission of a memorandum requested by the trial court.(Trp:p.42) It is apparent from Respondent's filings and arguments that she is arguing for summary judgment but does not want Appellants to exercise their rights to discovery before the motion is offered (SCRCP 56). Respondent contradicts her expressed position that she is unable to defend against the proposed amendment.(R.p.9-4-2020)

In Respondent's Initial Brief Argument I.1.B.2., she offers conclusions based on the improper, objectionable exhibits. This is a unilateral display of the material already in Respondent's possession. Respondent's argument here cannot be considered because the basis for the conclusions are not without genuine issue of material fact. For instance, loss of consortium is not merely spatial separation. See. Schumacher v. Cooper, 850 F. Supp. 438 (D.S.C 1994).Spousal aid can be a major component of consortium. After orchestrating the separation of her father and mother, knowing that her mother was fully dependent on her father for financial support in all sectors, Respondent opposed any effort to obtain spousal aid for her mother. Respondent claimed to be an appointed fiduciary for her father and retained

a board member of the father's appointed conservator to represent him in the action for spousal support. (Records: Chs. Co. Family Court). Further, with full knowledge of her parent's modest financial basis, Respondent admitted her father to one of the most exclusive senior facilities in this part of the state, Bishop Gadsden Episcopal Home. (Records: Chas. Co. Probate Court). An action for conspiracy may lie even though no unlawful means are used and no independently unlawful acts are committed. Lee v. Chesterfield General Hospital, Inc. 289 S.C. 6, 344 S.E. 2d 379 (Ct. App. 1986). Where the alleged object or means of a conspiracy is tortious, the complaint may allege both the independent tort and the civil conspiracy. Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987). Moreover, there are ample facts that Norman, Jr., incapacity had more to do with his physical limitations than mental deficits. (J. Scott Smith, M. Doy Letter: 8/31/2005) (C. Derrick, M.D., Letter 8/29/2005). The characterization of Mr. Knight as incapacitated was by agreement for administrative purposes, and not a final clinical diagnosis (Transcript. 2005 hearing). Moreover, the UBS funds were controlled by two orders, causing major confusion on its status (R. Young:10/5/05).

The tort of ' conspiracy' consists of a combination of two or more persons, for purposes of injuring Plaintiff, which causes her special damages. Mendelson v. Whitfield, 312 S.C. 17, 430 S.E.2d 524 (Ct. App. 1993). 'Consortium' involves love and affection, companionship and society, comfort, aid advice and solace, rendering of marital services, and any other elements that normally arise in close, intimate and harmonious marriage relationship. Schumacher v. Cooper, id. The original complaint requested a jury trial because it sought damages for the torts and breach of contract allegedly committed by Respondent. These issues raise questions of law. The proposed amendments raise other questions of law arising from the same conduct, transaction, and occurrence that inspired Respondent's behavior originally.

The Respondent does not deny knowledge of the facts proposed in the amendment. "It is not our role to determine whether the allegations Skydive might make in an amended pleading will state a valid claim. However, we cannot definitively say it is impossible for Skydive to plead a valid claim against Respondents." Skydive, 426 S.C. 187,826 S.E.2d 591.

In searching for the proper legal character of futility, Respondent urges this court to apply this states " Dead man's" statute to establish the ineligibility of Norman R. Knight "Bobby" Knight as a witness on the additional claims. Respondent's grasp of the concept of futility is more correct here than in her other description; however, because Bobby Knight is 95% eyewitness, he may testify on many issues relevant to the additional claims. He can recount the identities of persons and parties, along with certain behaviors; he is a proper historian; he can catalogue documents. Lisenby v. Newsom, 234 S.C. 237, 107 S.E.2d 449 (1959). Mr. Knight can recount the reschedule of appointments and visitation when Respondent, her sister, and others would change their plans at the last minute; he can testify concerning the origination of the family court suit involving Mr. and Mrs. Knight, Jr. he can testify about missing personal property and the possessors of the missing property. " In rare cases, however, a trial court may deny a motion to amend if the amendment would be clearly futile." Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E. 2d 585 (2019). Nothing in the objectionable material says that the amendment is clearly futile.

"Futility" as related to the issue of prejudice and amendments refers to the capacity to appear and/ or qualify for relief under a given cause of action. See, Jennings v. Jennings, 389 S.C. 190, 209,697 S.E.2d 671, 681 (Ct.App.2010), Higgins v. Medical University of South Carolina, 326 S.C. 592, 602-605, 486 S.E2d 269, 274-275 (Ct.App.1997).

Tanner v. Florence Cty. Treasurer, 336 S.C. 552, 558-60, 521 S.E.2d 153, 156-57 (1999) (analogizing a Rule 15(d) motion to supplement a complaint to a motion to amend a complaint under Rule 15 (c) and finding the trial court erred in denying the plaintiff's motion to supplement his complaint because the trial court should not have relied on the merits-related questions of whether the defendant was immune under the Tort Claims Act).

In this appeal, this Court must decide the question whether the Special Referee abused his discretion. An abuse of discretion arises in cases where (1): the judge issuing the order was controlled by some error of law; (2) the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support. Elliott v. Richland County, 327 S.C. 175, 489 S.E.2d 195 (1997). Nothing in this record demonstrates prejudice as defined by our jurisprudence. Respondent has offered no fact that places her at a disadvantage if the amendment is allowed. Appellants stand on the consistency of the restored original pleadings and the contemporaneous transactions, occurrences, and conduct that are reflected in those pleadings and the proposed amendment. Rules 15(a) and 15(c) are the controlling Law and they require the adoption of these additional causes.

The Special Referee did not give due regard to the original complaint's allegations of the wrongful destruction of the two story dwelling and small shed near the house. This allegation reflects only one of the behaviors that flourished at that time. The Rule 15(a) offering merely adds the other behaviors and conduct contemporaneous to the original filing. As reflected in Respondent's filings, this family is still contesting some of the issues regarding these estates. The Special Referee concludes that the parties would be challenged to investigate, discover and present evidence relating to a DSS proceeding that began in 2004/2005; and he thought the time and expense involved in the process is likely to be considerable.

This ruling is only conjecture and not supported by any evidence(SCRCP 52(a)). The Special Referee concludes that Respondent would be prejudiced by this alleged delay, and denied the motion to amend (R.p). Our Supreme Court in Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019) held that " A court's decision to deny a motion to amend should not be based on the court's perception of the merits of an amended complaint." Skydive at 426 S.C.182-183. Further, the court made clear that " If a proposed amendment is not clearly futile, then denial of leave to amend is improper." Id., 426 S.C. at 182 citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965, 167 L. Ed.2d 929, 940-941(A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely).

Much has been made of the pro se litigant withdrawing her proposed amendment to the original complaint. The restoration of the original complaint was premised on this motion being an outstanding motion that needed processing. A review of the argument then reveals that Ms. Knight's motion was to amend her complaint after an answer had been filed. Her motion was timely, satisfied subject matter jurisdiction, identified the proper parties, and clearly set out the very same causes that are offered now. The amendments were not defective then and they not defective now.

CONCLUSION

Appellants should be allowed to amend their complaints.

Respectfully Submitted
WHIPPER LAW FIRM

August 23, 2021

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v.

Chloe Knight Tonney,.....Respondent

PROOF OF SERVICE

The undersigned hereby certifies that the true copy of the foregoing Appellants' Reply Brief has been served on the South Carolina Court of Appeals by depositing a copy to them in the United States Mail, postage prepaid, on August 23, 2021, addressed to Clerk, South Carolina Court of Appeals, Post Office Box 11629, Columbia, South Carolina 29211 and served the same on Charles S. Altman, Attorney for Respondent, 575 King Street, Suite A, Charleston, SC 29403.

August 23, 2021

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August 23, 2021

The Honorable Jenny Abbott Kitchings
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Re: Judith A. Brown, as Personal Representative for the Estate of Mildred C. Knight, and Norman R. " Bobby" Knight III, Appellants v. Chloe Knight Tonney, Respondent
Appellants' Case No. 2021-000185
Original Appellants' Reply Brief- For Filing
Designation of Matter - For Filing
1 Proof of Service- For Filing

Dear Ms. Kitchings:

Find enclosed 1 Original Appellants' Reply Brief, 1 Unbound Designation of Matter, and the Proof of Service for filing and conforming. Also, enclosed is a self-addressed, stamped envelope for the return of the Proof of Service.

By copy of this letter, I am serving a copy of the same on Charles S. Altman, Esq. attorney for Respondent.

Sincerely,
WHIPPER LAW FIRM

J. Seth Whipper, Esquire

JSW:lds
Enclosures

xc: Bobby Knight
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