RECEIVED
Mar 11 2022
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY

The Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Tracking No. 2018-002223
(S.C. Ct. App. Filed March 11, 2022)

H. Hugh Andrews, Petitioner,

v.

Quentin S. Broom, Jr. Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Respondent, Quentin S. Broom, Jr. by email on March 11, 2022 addressed to his attorneys of record, Matthew T. Richardson, Esq., mrichardson@wyche.com, Wyche, P.A., P O Box 12247, Columbia, SC 29211; James Edward Cox, Jr., Esq., jcox@wyche.com, Wyche, P.A., P O Box 728, Greenville, SC 29602; and Whitney Boykin Harrison, Esq. wharrison@mcgowanhood.com, McGowan Hood Felder & Phillips, LLC, 1517 Hampton Street, Columbia, SC 29201.

I further certify that I have filed a copy of the Writ of Certiorari with the South Carolina Court of Appeals by emailing the same to ctappfilings@sccourts.org.

Respectfully submitted,

Pillsbury Law Firm, LLC

/s/Rodney F. Pillsbury

_____

Rodney F. Pillsbury (Fed Bar No.: 5963)
301 Rutherford St.
Greenville, SC 29609
Phone: (864) 241-9828
Fax: (864) 772-3418
Email: rodney@pillsburyfirm.law

Attorney for Respondent

March 11, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

CERTIFICATION OF COUNSEL

The undersigned counsel for Respondent H. Hughes Andrews certifies that Petition for Rehearing was made and finally ruled upon by the Court of Appeals on February 9, 2022.

STATEMEN OF THE CASE

As authorized by the South Carolina Appellate Court Rule 221(a), the Respondent moves for Reconsideration of the court's Opinion No. 2022-UP-022, filed January 12, 2022. The Petitioner respectfully submits that while the Court of Appeals incorrectly applied the relevant law to the facts and circumstances of this case.[1] In the Opinion under review, the Court reversed the Trial Court's decision on four (4) principal grounds:

1. Respondent's claims were barred by the law of the case;
2. Respondent's claims were barred by the statute of limitations;
3. Punitive damages should not have been awarded; and
4. Attorney's fees should not have been awarded.

Items two (2) through four (4) above stem are the resulting derivative application of its finding on the first issue to the remaining issues on appeal.

[1] In its opinion, the Court of Appeals made a factual finding, "By early 2005, Tri-Star was earning $180,000 per month." Andrews v. Broom, Unpublished Opinion No. 2022-UP-022, at p. 2. Incredibly, this statement was **never** a finding by the trial court and was, in fact, a hotly contested issue at trial. For example, the vast majority of funds the Petitioner used to clandestinely pay himself $920,000 he borrowed funds from personal sources and immediately repaid after showing the salary on the books of Tri-Star. The Court of Appeals cannot make its own findings of fact. In an action at law, on appeal of a case tried without a jury, the Court views the trial court's findings of fact as equivalent to a jury's findings in a law action, and will not disturb the findings unless the Court views the trial court's findings to be without reasonable evidentiary support. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

1. Because no appellate court has previously ruled on the substantive issue of the dismissal of Respondent's Counterclaims, the trial court was completely within its discretion to reverse its prior ruling and let the case proceed on its merits.

Petitioner and Respondent were former 50-50 business partners, operating through a closely-held corporation of the Petitioner's, Tri-Star Communication. After six (6) years of litigation, on the eve of its scheduled trial, the trial court ruled that Respondent's counterclaims were barred because the Respondent did not comply with Rule 23(b)(1), a procedural rule on its face applicable to class actions and shareholder derivative suits. This ruling contradicted the established law set forth in the American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 7.01(d) at 17 (2008):

> In the case of a closely held corporation, the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.
>
> *Id*.

Two (2) South Carolina courts have acknowledged this exception but could apply it due to the facts of those particular cases. See Babb v. Rothrock, 303 S.C. 462, 464-65, 401 S.E.2d 418, 419-20 (1991); see also Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676, 685 (Ct. App. 2001).

Following its ruling, Respondent appealed to the Court of Appeals. The overwhelming focus on Respondent's 2011 appeal was to address this issue. Because when the parties are *de facto* partners and the only two (2) shareholders of a closely-held corporation, the pleading pre-requisites and requirements for derivative shareholder actions

for large corporations make absolutely no sense. The Petitioner did not raise this issue any time prior during six (6) years of litigation, and only after he had dissolved the corporation, thereby making complying with the rule (even if applicable) an impossibility. The application of such a Rule 23(b)(1) to this case made zero practical sense. The counterclaims are not part of any class action. Also, when Respondent and Petitioner are the only shareholders, there is no logical reason to require the Respondent, the victim of a scheme by his partner to steal all of the company's assets, to specify efforts to get the board of directors (which there were none in this case) to act on Petitioner's theft of all of the corporate assets.

On appeal in 2015, there were essentially two (2) issues: (1) the dismissal of claims (i.e., should Rule 23(b)(1) apply to disputes between 50/50 owners of a closely-held corporation); and (2) amending the complaint.[2] The Court of Appeals addressed the latter of these two and remanded the case back to the trial court with a directive to rule on the amended complaint. Broom v. Ten State Street, Op. No. 2015-UP-030 (S.C. Ct. App. filed Jan. 14, 2015)]. On appeal to the Supreme Court, the Supreme Court addressed the amendment issue by reversing the Court of Appeals on its order to remand. Broom v. Ten State Street, Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015). Importantly, the Supreme Court never addressed the dismissal issue. *Id*.

[2] The reason why Respondent wanted to amend the complaint to begin with was to update the pleadings to reflect the facts that had been learned from six (6) years of discovery. The original counterclaims were filed in 2005. Respondent learned a great deal about Petitioner's theft of the corporate assets. If the appellate court was to decide a matter based upon the pleadings, Respondent believed the Court would benefit from knowing what had been learned over the prior six (6) years.

Respectfully, the Court of Appeals misinterpreted the impact of the ruling from the Supreme Court's decision in 2015 by conflating the separate issues before the Court. In its opinion, the Court summarized the Supreme Court's decision as follows:

> Our supreme court reversed this, holding that "the issue on appeal—whether the [circuit court] erred in dismissing [Andrews]'s counterclaims without allowing [Andrews] to amend his pleadings—was not preserved for review." Broom v. Ten State Street, LLP, Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015).
>
> Andrews v. Broom, Slip. Opin. No. 2022-UP-022 (filed, January 12, 2022)

Importantly, deciding whether the counterclaims were properly dismissed is, and has always been, a separate and independent issue – one which neither appellate court addressed. Because neither appellate court addressed the dismissal issue, the order dismissing Respondent's counterclaims does not qualify as "the law of the case" under South Carolina law. *Cf*, Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, **but expressly rejected by the appellate court**.") (emphasis added). Indeed, every case relied upon by the Court of Appeals in its opinion can be distinguished on this basis.[3]

The law of the case "prohibits issues which have been *decided* in a prior appeal from being relitigated in the trial court in the same case." Ross v. Med. Univ. of S.C., 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) (emphasis added). Nothing was decided in the prior appeal. The Court of Appeals tried to remand the case for a ruling on the motion to amend,

[3] For example, RIM Assocs. v. Blackwell, 359 S.C. 170, 597 S.E.2d 152 (Ct. App. 2004) is inapplicable to this issue because there has never been a final ruling on merits of the Rule 23 issue. Mason v. Mason, 412 S.C. 23, 770 S.E.2d 405 (Ct. App. 2015) is inapplicable because Respondent raised the issue in question on appeal, but no appellate court has addressed it. Hudson ex rel. Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 754 S.E.2d 486 (2014) is inapplicable because Respondent never abandoned this issue on appeal.

specifically instructing the circuit court that amendments should be freely granted. The Supreme Court reversed the Court of Appeals for addressing a motion that had not been ruled on. The Supreme Court remitted the case back to the trial court.

The law of the case applies to subsequent proceedings in the same litigation following an appellate decision. Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard, 334 S.C. 244, 245, 513 S.E.2d 96, 96-97 (1999). This part of the doctrine is obviously satisfied: the proceedings following the Supreme Court's remittitur (ruling on motion to amend; trial; and ruling on all post-trial motions) were in the same litigation following an appeal.

Here, because there was a pending motion to amend, and neither appellate decision addressed the applicability of Rule 23 to closely-held corporations issues (directly or indirectly), the trial court was free to take up the pending motion to amend. *See*, Tillman v. Tillman, 801 S.E.2d 757, 420 S.C. 246 (S.C. App. 2017) In *Tillman*, the court explained "the fate of [a party's] counterclaims has not been finally determined as long as his motion to amend hangs in the balance," and it also noted, "the ease with which pleadings may now be amended." *Id*. at p. 759.

2. The remaining three (3) holdings of the Court's opinion should be reversed on similar grounds.

The remainder of the Court's opinion finds that Respondent's claims were barred by the statute of limitations; that punitive damages should not have been awarded; and that attorney's fees should not have been awarded – all of these were premised upon the erroneous conclusion that the merits of Respondent's appeal of his counterclaims had been addressed or adjudicate during the prior appeal. Because there was never a ruling on the

merits of Respondent's appeal about the applicability of Rule 23, these claims were neither final nor fully adjudicated. As such, they were not barred by the statute of limitations, and the Court's award of punitive damages and attorney's fees was proper.

CONCLUSION

To this day, no appellate court has addressed the merits of Petitioner's appeal about the applicability of a pleading requirement in Rule 23 to closely-held corporations. Because there was no ruling on the merits, the trial court's 2011 order was neither final nor *res judicata* to the proceedings which took place when the case was remitted back to the trial court. Respectfully, the Court of Appeals erred in holding otherwise.

Respectfully submitted,

Pillsbury Law Firm, LLC

/s/Rodney F. Pillsbury

Rodney F. Pillsbury (Fed Bar No.: 5963)
301 Rutherford St.
Greenville, SC 29609
Phone: (864) 241-9828
Fax: (864) 772-3418
Email: rodney@pillsburyfirm.law

January 27, 2022