

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2022-000285
(S.C. Ct. App. filed Jan. 11, 2022)

H. Hugh AndrewsPetitioner,

v.

Quentin S. Broom, Jr. Respondent.

RETURN TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION FOR REVIEW

- 1. Where Petitioner failed to obtain relief in his first appeal from a dismissal with prejudice of all his claims, was the Court of Appeals correct in holding Petitioner's claims which were reinstated after the unsuccessful appeal by the trial court were barred by both the law of the case doctrine and the statute of limitations?**

STATEMENT OF THE CASE

This dispute between two videogaming business partners has a protracted and cumbersome history spanning more than sixteen years and three appellate decisions, including two during an earlier appeal. Respondent Quentin Broom initially filed a lawsuit in 2005 alleging a variety of claims against Petitioner Hugh Andrews in connection with being equal shareholders in Tri-Star Communications, Inc. ("Tri-Star"). (R. pp. 76-94) In 2006, Andrews alleged counterclaims based on various allegations of mismanagement on the part of Broom as an officer and director that allegedly resulted in losses to Tri-Star, as a corporate entity, and to Andrews, as a shareholder and creditor of Tri-Star. (R. pp. 95-108)

Prior to any appeal or trial, Broom moved to dismiss the counterclaims primarily because Andrews failed to comply with the pleading and demand requirements of Rule 23(b)(1), SCRCPP, for derivative actions by shareholders. (R. pp. 2480-82) Following a hearing, the Honorable J. Mark Hayes dismissed with prejudice Andrews' counterclaims for failing to comply with the requirements of Rule 23(b)(1), SCRCPP. (R. pp. 1-9) Andrews then moved for reconsideration and moved to amend the counterclaims "based upon information learned and/or events that have transpired since the filing of his Amended Answer and Counterclaims in May 2006." (R. pp. 2483-2531) Andrews did not seek leave to amend to comply with the requirements of Rule 23(b)(1), SCRCPP. The trial court denied the motion for reconsideration but did not explicitly rule on the motion for leave to amend. (R. pp. 10-11)

Andrews appealed the dismissal with prejudice of all his counterclaims, arguing for the creation of a new rule for an exception to the derivative suit filing requirements when a corporation only has two shareholders and that he should have been given an opportunity to amend the pleadings before their dismissal. (R. pp. 2542-2551) Broom responded, arguing that the claims were derivative, not direct, and that clear precedent required the special pleading rule for derivative claims. (R. pp. 2571-2582) Broom also pointed out Andrews' argument about an amendment was not preserved for review. (R. pp. 2583-84) Following oral argument, the Court of Appeals issued an unpublished opinion that "did not address these issues and, instead remanded the case to the [trial] court so the trial judge could rule on [Andrews'] Rule 15, SCRCPP, motion to amend the pleadings." *Broom v. Ten State St., LLP*, No. 2015-000583, 2015 WL 5728106, at *1 (S.C. Ct. App. Sept. 30, 2015). (R. pp. 12-14)

Broom petitioned for review to this Court, which issued an unpublished opinion based solely on the petition and return, reversing the Court of Appeals because the issue raising the amendment to Andrews' pleading was not preserved. (R. pp. 15-17) The matter was then remitted to the trial court for resolution of Broom's pending claims, instead of being returned to the Court of Appeals to address Andrews' remaining issue on appeal. (R. pp. 2604) No motion to cure the direct remittitur to the trial court was made.¹

After remittitur, at a hearing in the circuit court in June 2016, Andrews orally moved to amend his dismissed pleading, this time for the purpose of meeting the pleading requirements of

¹ Andrews' counsel wrote a letter to this Court to note the discrepancy, to which the clerk of court responded by notifying counsel that the sole basis to maintain appellate jurisdiction was through a motion to reinstate a remittitur that was sent down by mistake, error or inadvertence, citing *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007). (R. pp. 2611-12) Andrews did not make that motion.

Rule 23(b)(1), SCRPC. (R. pp. 18-36) The trial court granted this motion to amend,² and Andrews then filed a second amended answer that asserted the same counterclaims as in his previous pleading but complying with the pleading requirements of Rule 23(b)(1), SCRPC. (R. pp. 130-147) Broom moved to dismiss the new counterclaims under the law of the case doctrine based on the trial court's prior judgment on the counterclaims and Andrews' failure to obtain a reversal on appeal. (R. pp. 2613-2622) The trial court denied the motion to dismiss, and the matter was scheduled for a bench trial. (R. pp. 38-40) Shortly before trial, Broom dismissed all his claims, leaving only Andrews' new counterclaims from the second amended answer and counterclaims.³ (R. pp. 41-43) The parties were realigned, and the matter was recaptioned with Andrews as the plaintiff for trial. (R. pp. 44-45)

In June 2017, a three-day bench trial was held. Both Andrews and Broom testified that Broom served as Tri-Star's sole director and sole officer overseeing and running Tri-Star's business operations, that he did not receive any salary from the inception of the company in 1997 until 2004, and that he was entitled to a salary for the entirety of his employment. (R. p. 276, line 25-p. 278, line 5; pp. 316-321, 449, 455-57; p. 462, line 17-p. 464, line 19) Andrews acknowledged that he did not pay much attention to Tri-Star's operations and that he relied on his agents who had full access to the ledger showing all transactions. (R. p. 466, line 11-p. 467, line 1; p. 502, line 18-p. 503, line 18)

² This matter was returned to the Honorable J. Mark Hayes, II.

³ These claims included (1) Breach of Fiduciary Duty; (2) Breach of Contract; (3) Breach of Contract Accompanied by a Fraudulent Act; (4) Breach of the Covenant of Good Faith and Fair Dealing; (5) Conversion; (6) Violation of S. C. Code of Laws §33-8-300; (7) Violation of S.C. Code of Laws §33-8-420; (8) Promissory Estoppel; (9) Fraud; and (10) Negligent Misrepresentation.

Tri-Star's CPA, Tim Russell, testified by deposition at the trial that Broom consulted him about taking a fair and reasonable deferred salary, and Russell agreed that the salary amounts were reasonable. (R. p. 2471) These payments were placed in Tri-Star's ledger, and copies of financial statements showing all payments and amounts were provided monthly to Andrews' agents. (R. p. 516, line 18-p. 522, line 21; pp. 1541, 1555, 1558, 1606-1622, 2462, 2471)

The undisputed evidence at trial also showed that Tri-Star's operations in the Dominican Republic remained intact until June 2005 when, without notice, the Dominican Republic ordered the immediate shutdown of the gaming industry and removal of gaming machines. (R. p. 345, line 17-p. 347, line 17; pp. 972-985) Broom guided the company through this difficult time, and at the end of 2005 during the wind down, an equity distribution was issued to both Broom and Andrews after all outstanding debt was satisfied and before Broom received all his deferred salary payments.⁴ (R. p. 346, lines 12-23; R. p. 1435-36)

Following trial, the circuit court issued an order in November 2017 holding that the law of the case doctrine did not bar Andrews's claims and finding in favor of Andrews on only one of his ten causes of action. Specifically, the trial court awarded \$1,020,000 for willful breach of fiduciary duty by Broom for paying deferred salary payments to himself in late 2004 and the first part of 2005. (R. pp. 49-67) The damages represented one-half of the \$1,020,000 total salary that Broom received from Tri-Star for seven years of work, and another \$510,000 in punitive damages. A year later, the trial court denied Broom's motion for reconsideration and granted Andrews' motion for attorneys' fees, entering a judgment in the amount of \$1,214,406.53. (R. pp. 68-75)

⁴ Tri-Star ceased operations and wound down in December 2005. It was administratively dissolved on August 13, 2009.

Broom appealed the trial order and post-trial judgment. On January 12, 2022, the Court of Appeals issued Opinion No. 2022-UP-022 in this case, reversing the judgment of the circuit court. In its opinion, the Court of Appeals correctly held that Andrews' claims were barred by both the law of the case doctrine and the statute of limitations. The Court of Appeals noted the reasons that the law of the case applied to his claims:

Andrews received a final adjudication from the circuit court when the case was dismissed with prejudice. He appealed that final adjudication. However, the ground on which this court remanded was later found by our supreme court to have not been preserved for review. Therefore, "whether the [circuit court] erred in dismissing [Andrews]'s counterclaims without allowing [Andrews] to amend his pleadings" was not appealed because it could not be.

(Opinion at 4 (alterations in original) (quoting *Broom v. Ten State Street, LLP*, Op. No. 2015-MO-057 (S.C. Sup. Ct. filed Sept. 30, 2015)))

The Court of Appeals also observed that

the circuit court erred in finding that its initial ruling was interlocutory. The court had already determined whether Andrews had a right to bring his action in its motion to dismiss. While Broom's underlying claims were still live at that point, that does not provide life to Andrews's counterclaims; a final adjudication on those claims was made with the dismissal with prejudice.

(Opinion at 5) Furthermore, the Court of Appeals held that there was "no good cause here" to disregard the law of the case doctrine as a matter of discretion because "Andrews did not take the procedural steps necessary to preserve his grounds for appeal." (Opinion at 6 n.5)

The Court of Appeals additionally held that the statute of limitations was an independent bar to Andrews' claims. The Court of Appeals rejected Andrews' efforts to apply the "relation back" doctrine of Rule 15(c), SCRCP, because "no appellate court modified the order to dismiss the case with prejudice," and "[t]herefore, Andrews's counterclaims remained dismissed, and could not be used for the purposes of the relate-back doctrine." (Opinion at 7)

Andrews' petition for rehearing with the Court of Appeals was denied, although the Court of Appeals issued a substituted opinion (the "Opinion") removing one factual finding in the court's original opinion. Andrews then timely filed a petition for writ of certiorari (the "Petition").

ARGUMENT

I. Where Petitioner failed to obtain relief in his first appeal from a dismissal with prejudice of all his claims, the Court of Appeals correctly determined that his claims were barred by both the law of the case doctrine and the statute of limitations.

In his Petition, Andrews asks this Court to overlook multiple errors he made in pursuing his claims over twelve years, dismissal of all his claims with prejudice, an unsuccessful appeal of that dismissal, and the law of the case doctrine on appellate finality; in order to rule on a substantive issue of law that Andrews did not take care to preserve the first time and that the Court of Appeals correctly held could not be relitigated a second time. Moreover, Andrews's claims are not only barred by the law of the case doctrine but also by the mandatory bar of the statute of limitations because the new counterclaims complying with the rules for derivative claims were not filed until more than six years after they accrued and more than four years after they were first dismissed with prejudice. For these reasons, the Court should reject Andrews's petition on the straightforward legal issues correctly decided by the Court of Appeals.

A. The Court of Appeals correctly held that Petitioner's claims were barred by the law of the case doctrine.

Andrews erroneously argues that the law of the case doctrine does not apply because the specific issue that he wishes for this Court to review – the applicability of the derivative claim pleading requirements of Rule 23(b)(1), SCRCp, to his claims – was not decided during the prior appeal. (Petition at 11-12) This argument mistakenly narrows the basis of the law of the case doctrine. The Court of Appeals correctly held that the law of the case doctrine applied to the

dismissal with prejudice of Andrews’s claims from which he unsuccessfully appealed and covers all issues subsumed within that prior dismissal and subsequent unsuccessful appeal.

Andrews’s argument is based on a mischaracterization of the underlying proceedings. First, Andrews incorrectly argues that “there has never been a final ruling on [the] merits of the Rule 23 issue.” (Petition at 12 n.2). In fact, the Circuit Court specifically addressed and rejected Andrews’s arguments regarding the application of the pleading requirements of Rule 23(b)(1), SCRCP, when it dismissed Andrews’ claims with prejudice in 2011. (R. pp. 1-9) A decision on an issue does not need to be an appellate decision to constitute the law of the case, it need only be a final decision that *could have* been appealed. *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.”); *Mason v. Mason*, 412 S.C. 28, 48, 770 S.E.2d 405, 415 (Ct. App. 2015) (“[A]n unappealed ruling, right or wrong, is the law of the case.”).

The Circuit Court’s 2011 Order certainly meets that standard, given that Andrews *did* appeal and obtained no relief in the appeal. *See Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119–20, 754 S.E.2d 486, 490 (2014) (“Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order.”) Thus, the Circuit Court’s 2011 decision constitutes the law of the case as to both the resolution of Andrews’s claims – dismissal with prejudice – and the reason for that dismissal – failure to comply with Rule 23(b)(1), SCRCP. *See RIM Assocs. v. Blackwell*, 359 S.C. 170, 182, 597 S.E.2d 152, 159 (Ct. App. 2004) (“A case that is dismissed ‘with prejudice’ indicates an adjudication on the merits and, pursuant to res judicata, prohibits subsequent litigation to the same extent as if the action has been tried to a final adjudication.”).

Next, Andrews is wrong on both the facts and the law when he argues that “because there was a pending motion to amend . . . the trial court was free to take up the pending motion.” (Petition at 12.) Andrews is wrong on the law because there was nothing interlocutory about the earlier dismissal with prejudice of all of his claims. As the Court of Appeals correctly observed

The [circuit] court had already determined whether Andrews had a right to bring his action in its motion to dismiss. While Broom’s underlying claims were still live at that point, that does not provide life to Andrews’s counterclaims; a final adjudication on those claims was made with the dismissal with prejudice.

(Opinion at 5) Put another way, the only reason that the first appeal did not end the entire case was because Broom’s own claims were still pending. It makes no sense that such a coincidental fact should determine whether the circuit court has the power to resuscitate claims that have been dismissed with prejudice.

The Court of Appeals made two similar points which Andrews ignores in his Petition and which further demonstrate why his position cannot be right. First, the Court of Appeals noted that the circuit court’s decision granting Andrews leave to amend was inherently in conflict with this Court’s ruling in the first appeal that reversed the remand of the case to consider the pending motion for leave to amend. (Opinion at 5) The circuit court’s decision to permit amendment rendered this Court’s decision a nullity. Contrary to Andrews’s argument that his motion to amend was still “hang[ing] in the balance,” this Court’s decision made clear that the motion to amend was no longer viable. (Petition at 13, citing *Tillman v. Tillman*, 801 S.E.2d 751, 759, 420 S.C. 246 (S.C. App. 2017))

Second, the Court of Appeals correctly noted that “if a different circuit court judge than the one who dismissed the case were to have heard the motion to amend, the second judge would have been unable to grant it.” (Opinion at 6, quoting *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013)). Just as the happenstance of Broom having his

own pending claims should not be a basis for changing the result of the dismissal with prejudice of Andrews' claims, so too the identity of the trial judge should not be outcome-determinative.

Andrews also gets the facts wrong in arguing that his "pending motion to amend" before the first appeal was the basis for revival of his claims. (Petition at 12.) The motion to amend that Andrews filed before the first appeal (which he failed to obtain a ruling on) was *not* the motion to amend that the circuit court eventually granted after the first appeal. The pre-appeal motion to amend merely sought to amend "based upon information learned and/or events that have transpired since the filing of his Amended Answer and Counterclaims in May 2006" and did not attempt to cure the pleading deficiencies identified in the circuit court's ruling dismissing the claims with prejudice. (R. pp. 2514-2531) Rather, it was not until after the case was remitted from the first appeal that Andrews made a *new* motion to amend to comply with the Rule 23(b)(1), SCRCPP, pleading requirements, which is the motion that the circuit court ultimately granted. (R. pp. 18-36, 130-147)

Because the circuit's court's dismissal with prejudice was a final decision that disposed of Broom's claims, the law of the case doctrine would apply even if Andrews's pre-appeal motion to amend had been the motion to amend that the circuit court ultimately granted. Nonetheless, the two motions to amend were not the same, so Andrews's argument fails in any event.

B. The Court of Appeals correctly held that Petitioner's claims were barred by the statute of limitations.

The Petition barely references an independent basis on which the Court of Appeals reversed the Circuit Court's judgment – the statute of limitations. Andrews did not file his second amended counterclaims until 2016, which is long past the three-year statute of limitations for the actions that occurred in 2004-2005. S.C. Code Ann. §§ 33-8-300(e); 33-8-420(e). The Court of Appeals correctly held that Andrews could not take advantage of the relation back doctrine of Rule 15,

SCRCP, because his claims were dismissed with prejudice and no appellate court modified that disposition.

In ignoring this issue, Andrews incorrectly assumes that his claims would not be barred by the statute of limitations if the law of the case doctrine did not apply. (Petition at 13 n.3) The law of the case doctrine only addresses whether any court may reconsider the previous decisions in the case. Even if those decisions could be reconsidered (which they cannot), Andrews was still required to comply with any legal requirements to bring his claims, including the statute of limitations. He did not do so, and the statute of limitations bars his claims even if the law of the case doctrine did not apply.

C. Discretionary relief cannot and should not be granted.

Andrews concludes his Petition with a plea that the Court exercise discretion to reverse the Court of Appeals and hold that the law of the case doctrine does not apply here based on both the absence of a ruling on the Rule 23 pleading issue during the first appeal and the underlying facts. (Petition at 13-16) This plea should be rejected for three independent reasons.

1. Petitioner waived the right to make a plea for discretionary relief.

First, Andrews did not make a plea for discretionary relief based on the underlying facts, either in his Answering Brief or in his petition for rehearing. Rather, the extent of his reference to discretion in the Court of Appeals was in the petition for rehearing and, even then, was based only on the procedural history of the first appeal. Thus, Andrews has not preserved this issue for review. Rule 242(d)(2), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”); *see also Mazloom v. Mazloom*, 392 S.C. 403, 403, 709 S.E.2d 661, 661 (2011).

2. The statute of limitations is an independent and mandatory bar, so discretionary relief is not available.

Second, as noted above, the statute of limitations is an independent bar to Andrews' claims that applies regardless of whether the law of the case doctrine applies. As the Court of Appeals correctly noted, the appellate courts do have discretion when a statute of limitations has expired to modify a dismissal with prejudice to permit amendment of the complaint under Rule 15, SCRCF. (Opinion at 7.) But Andrews did not obtain such relief during the first appeal, so the 2016 pleading was still barred by the statute of limitations. Thus, even if discretionary relief on the law of the case doctrine was warranted (which it is not), such relief would not save Andrews's claims.

3. Discretionary relief is not warranted here.

Finally, although discretionary relief from the law of the case doctrine would not be sufficient to reverse in any event, the Court of Appeals correctly determined that there is "no good cause here, nor reason for grace" from application of the law of the case doctrine. (Opinion at 6, n.5) The Court of Appeals was correct to note that good cause did not exist because "Andrews did not take the procedural steps necessary to preserve his grounds for appeal," but Andrews also failed to take two other steps to preserve his arguments.

First, beyond not obtaining a ruling on his motion for leave to amend prior to the first appeal, the motion for leave to amend that Andrews filed before the first appeal did not attempt to cure the pleading deficiencies in his claims. Rather, instead of seeking to comply with the derivative claim pleading requirements of Rule 23(b)(1), SCRCF, his pre-appeal motion for leave to amend merely sought to amend the pleading "based upon information learned and/or events that have transpired since the filing of his Amended Answer and Counterclaims in May 2006." (R. pp. 2514-2531) Thus, Andrews not only failed to obtain a ruling from the circuit court on the motion

for leave to amend but also failed to present a proposed amendment that would cure the deficiencies identified in the circuit court's dismissal of his claims with prejudice.

On top of this error, Andrews also failed to preserve appellate review of the question of whether the pleading standards of Rule 23(b)(1), SCRCR, applies to his claims. Andrews could have filed a motion for reinstatement of the first appeal to seek review of that issue. *Wise*, 372 S.C. at 174, 642 S.E.2d at 551, citing *State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1893); *see also* Rule 221, SCACR. He was even notified of that option, yet he chose not to take it.

Aside from Andrews's failure to preserve his claim, discretionary relief from application of the law of the case doctrine is also not warranted based on either the underlying legal issue or the equities. The underlying legal issue of whether a court may treat the derivative claims of a close corporation as a direct action is not nearly as significant as Andrews claims. (Petition at 14) The pleading and demand requirements for derivative actions of Rule 23(b)(1), SCRCR, are not difficult to meet. Rule 23(b)(1), SCRCR, permits a shareholder to plead that any demand on the company would be futile, which is exactly what Andrews pled in his second amended counterclaims, along with verifying his pleading. *See* Rule 23(b)(1), SCRCR ("The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort."). Furthermore, Andrews presents no reason he could not receive recovery through a derivative action here.

Finally, the equities do not support relief. Andrews's failure to properly plead his claims caused a lengthy delay in the trial in this action, which was not fair to Broom or to the interests of justice. Nevertheless, substantial evidence in the record demonstrates that Broom was entitled to the salary that the Circuit Court erroneously concluded breached his duties to the company. Both

Andrews and Tri-Star’s CPA Russell testified that Broom was entitled to a reasonable salary for his efforts. (R. p. 462, line 5-p. 464, line 19; R. p. 2471) Evidence demonstrated that the salary amounts were discussed and reported as reasonable and fair by Tri-Star’s CPA and attorneys. (R. p. 337, line 12-p. 343, line 24; R. pp. 2462-2471) Moreover, the Corporate Code specifically shields Broom from liability when he relied on Tri-Star’s attorneys and CPA, including Russell’s trial testimony through deposition that the deferred salary payment amounts were reasonable. *See* S.C. Code Ann. §§ 33-8-300(b) & -420(b) (stating officers are “entitled to rely on information, opinions, reports, or statements . . . by . . . legal counsel [and] public accountants”).

Thus, while the underlying facts are not material to the issues decided in the Opinion and cannot serve as a basis for reversal, they do not support such action in any event.

CONCLUSION

For the reasons stated, this Court should deny the Petition, allowing to stand the Court of Appeals’ Opinion reversing and remanding the judgment of the Circuit Court.

April 11, 2022
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Respectfully submitted,

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