FINAL BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2011-CP-40-05170R

Jerry Gadson and
Sheila Gadson,

Appellants

V.

Caroline Deloatch and
Bank of America,
Individually and Jointly

Respondents

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 26, 2009, Jerry Gadson and Sheila Gadson ("Appellants" or "the Gadsons") commenced this action by filing a complaint against Caroline Deloatch and Bank of America ("Respondents") alleging negligence (and/or assault and battery) and loss of consortium. (R. pp. 9-19). By letter dated April 9, 2010, Respondents made a Request for Admission to Appellants. (R. pp.56-58). Appellants did not respond to Respondents' Request for Admission, because at the time both parties were contemplating getting the case struck from the docket. On May 14, 2010, approximately 36 days from receipt of Respondents' Request for Admission, both the parties to this suit filed a joint motion to strike the case from the records to discuss settlement and further discovery. (R. pp. 74-76). On May 17, 2010, the Court granted the parties' consent motion to strike this case from the docket. On December 6, 2010, Appellants sent an unfiled answer to respondents' attorney denying all requests to admit. (R. pp. 78-81). This answer was unrecorded because it was sent at a time the case was not active on the docket. The answer was sent subsequent to striking off but prior to restoration of this case to the docket. On March 7, 2011, the case was restored to the docket by the Court Clerk on motion by Appellants. (R. p. 2). On November 1, 2011, Respondents filed motion to dismiss for failure to prosecute and motion for summary judgment. (R. pp. 83-89. On December 28, 2011, Respondents amended their motion for summary judgment limiting their argument to Appellants' alleged failure to respond to their Request for Admission and removing from record its motion to dismiss for failure to prosecute. (R. pp. 90-96). On January 31, 2012, Appellants filed motions to extend time to respond to Respondents' Request for Admission, and/or motion to withdraw deemed admissions. (R. pp. 114-122).

On March 20, 2012, the learned Trial Judge of the Court of Common Pleas, 5th Judicial

Circuit, Richland County ("the Trial Court"), dismissed Appellants' motion to extend time to respond to Respondents' Request for Admission, and/or motion to withdraw deemed admissions. (R. pp. 3-8). The Trial Court granted Respondents' amended motion for summary judgment, stating that Appellants did not respond to Respondents' Requests for Admissions on time, hence, in light of the deemed admissions it was conclusively established that there was no genuine issue as to material fact. (R. p. 6). On April 17, 2012, Appellants served a notice of appeal on Respondents. (R. p. 136).

FACTS

Caroline Deloatch ("Ms. Deloatch"), is a bank manager and employee of Bank of America, located at Polo Road Banking Center, 9732 Two Notch Road, Columbia, South Carolina 29223 ("bank premises"). (R. pp. 9-19,Complaint, ¶ 3, p. 2). Appellant, Jerry Gadson ("Mr. Gadson), was visiting the bank premises for the purpose of transacting business with Respondent, Bank of America, when he was assaulted and battered by Ms. Deloatch. Without cause or provocation, Ms. Deloatch, came into the assistant manager's office where Mr. Gadson was seated and subjected him to vociferous and abusive language. Ms. Deloatch directed those aggressive gestures towards Mr. Gadson intending to threaten and strike him (R. pp. 9-19, Complaint, ¶¶ 11-12, p. 3-4). As a direct and proximate cause of Ms. Deloatch's conduct, Mr. Gadson suffered serious physical and mental injuries including coronary discomfort, depression, and anxiety that required medical treatment and hospitalization (R. pp. 9-19,Complaint, ¶¶ 22-24, p. 6). Appellant, Shiela Gadson ("Mrs. Gadson"), suffered loss of consortium, stress and depression, because of her husband's injury ((R. pp. 9-19), Complaint, ¶¶ 34-35, p. 8).

ARGUMENTS

I. Did The Trial Court Err In Granting Summary Judgment Because Gadsons Did Not Respond To A Request For Admission?

Because the Trial Court failed to assign any reason whatsoever for denying Gadsons' motion to extend amend or in the alternative withdraw the deemed admissions, summary judgment should have been denied. (R. pp. 27- 55). Gadsons filed this action on May 27, 2009, (R. pp. 9-19), and approximately a year later, by letter dated April 09, 2010, Respondents made their request for admissions on Gadsons. (R. pp. 59-73). Meanwhile, the parties filed a motion under SCRCP 40(j), (R. pp. 74-76), to get the case to be stricken from the docket, and as the Gadsons gave their consent to this, the Trial Court granted the motion on May 17, 2010, and the case was struck from the roster (Consent Motion Striking Case From Docket Pursuant To Rule 40(j); Order Granting Motion To Strike Case From Docket Pursuant To Rule 40(j)). (R. p. 1). The parties filed the Rule 40(j) Motion approximately 36 days after Respondents letter dated April 9, 2012, to Request for Admission from Appellants. (R. pp. 56-58). This effectively means that the parties were contemplating a Rule 40(j) motion during the time Gadsons were required to file their response to Respondents' request for admission. The Gadsons filed a motion to restore the case on March 08, 2011. (R. p. 2).

In the Trial Court, Respondents contended that, as the Gadsons did not respond to their request for admission, all their requests were deemed admission, and as such their remained no genuine issue of facts. (R. pp. 29, lines 13-19). This argument was flawed for two reasons, (1) the Gadsons had filed a motion to extend time or in the alternative motion to withdraw the deemed admission; and (2) Respondents proffered no reason as to what harm or injustice would be caused to them if the Gadsons withdrew their admission. (R. pp. 34-44) (R. pp. 114-122).

Here, when the parties filed their consent motion to get the case stricken from the roster,

the discovery process had barely begun. Regardless of a Rule 40(j) dismissal, an action is still pending because it can be restored. See *Western Heritage Ins. Co. v. Elephant, Inc.*, No. 6:07-cv-2705-GRA, 2008 U.S. Dist. LEXIS 44392, at *3-4 (D.S.C. June 5, 2008). In this case, the Gadsons responded to Respondents' request for admission on December 06, 2010. *Nat'l Specialty Ins. Co. v. AIG Domestic Claims, Inc.*, No. 6:10-cv-00826-JMC, 2011 U.S. Dist. LEXIS 46375, at *4-5 (D.S.C. Apr. 29, 2011) (finding that "[a] formal written motion to withdraw is not necessary. A request to withdraw usually may be made orally or may be imputed from a party's action. Courts have even found that a late response to requests for admission is equivalent to a withdrawal of a deemed admission").[1]

Accordingly, Appellants have established that they had withdrawn their admissions.

II. Did The Trial Court Err Not Allowing Appellants From Withdrawing Deemed Admissions?

Even assuming that the Trial Court that Respondents correctly argued that because Appellants did not timely respond to their request for admission, because they offered no evidence that they would be prejudiced if the admissions were withdrawn, the Trial Court should have allowed Appellants to withdraw the deemed admissions. (R. pp. 114- 122) (R. pp. 123-132). *Pike v. South Carolina Dep't of Transp.*, 343 S.C. 224 (2000) (it is well settled that the

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[1] Admittedly, in *AIG Domestic Claims*, the District Court was interpreting Fed. R. Civ. P. 36 (b), and not SCRCP 36(b), there is not much of a difference in the wordings of the two similar Rules of Civil Procedure:
"EFFECT OF AN ADMISSION; WITHDRAWING OR AMENDING IT. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding." Fed. R. Civ. P. 36(b) Compared with SCRCP 36(b):
"Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose." SCRCP 36(b).

admission and rejection of testimony are matters largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion.)

SCRCP 36(b) provides that a court must grant withdrawal the admissions when: (1) it would promote the presentation of the merits of the action and (2) if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. *Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs.*, 347 S.C. 545, 557 (S.C. Ct. App. 2001)[2]; see also *Barber v. Hobbs*, 313 S.C. 319, 321 (S.C. Ct. App. 1993).

Some of the allegations in the complaint include that Plaintiff Jerry Gadson yelled at, screamed at and assaulted by Defendant Caroline Deloatch, and that Jerry sustained serious personal and mental injuries. (R. 9-19, ¶¶ 11, 13 Complaint). In the request for admissions, Respondents state that "[a]dmit that at no time did Caroline Deloatch yell and scream abusive comments in Jerry Gadson's face; [a]dmit that Plaintiffs have no evidence that at any time Carolins Deloatch intended to strike or cause bodily harm to Jerry Gadson" (R. pp. 56-57, ¶¶ 2, 3 Respondents Request for Admission). Because Gadsons did not respond to these and other such requests, they were considered as deemed admissions. The deemed admissions that Caroline Deloatch never abused Mr. Gadson or that Appellants did not have evidence that Mr. Gadson was assaulted go to the heart of this matter. According to Respondents, by not responding to request for admissions, the Gadsons have surrendered their claims to Respondents. The only reason behind Appellants' failure to timely respond was because both parties consented to get this case struck from the docket, and not because Gadsons did not intend to respond to

[2] In *Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs.*, 347 S.C. 545, 557 (S.C. Ct. App. 2001), the court opined that Rule 36(b) provides that a court must grant withdrawal of admissions when: (1) it would promote the presentation of the merits of the action and (2) if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. Allowing the withdrawal of deemed admissions would have done nothing more than conform the admissions to the consistent testimony offered by Appellants at trial.

those admissions.[3] As a court may permit withdrawal of admissions such as these as it would promote the presentation of the merits of the action, the Gadsons have established the first element of SCRCP 36(b).[4] *Baughman v. At&T*, 306 S.C. 101, 110 (S.C. 1991) (permitting withdrawal of deemed admissions when the two elements of rule 36(b) were satisfied).

As to the second element, the Gadsons submit that the gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party.[5] *See State Hwy. Dep't v. Booker*, 260 S.C. 245 (1973); *Hodge v. Myers*, 255 S.C. 542 (1971). Respondents failed establish that they would be prejudiced if the admissions are allowed to be withdrawn primarily because the case was in a state of suspended animation during the time it was stricken off, for which Respondents had given a consent. Because Respondents consented to the case being struck of 36 days after they requested admissions, they cannot establish prejudice.

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[3] Moreover, where the untimely filing of responses to requests to admit contains answers similar to denials contained in the same defendant's answer, those untimely responses may be deemed the functional equivalent of a motion to withdraw admissions made under Rule 36(b). *Nat'l Specialty Ins. Co.*, No. 6:10-cv-00826-JMC, 2011 U.S. Dist. LEXIS 46375, at *4-5 (D.S.C. Apr. 29, 2011). Here, as in *AIG Domestic Claims*, Appellants' Complaint completely negates the request for admissions. Irrespective of the deemed admissions, the fact remains that Mr. Gadsons was battered by Deloatch, and suffered injuries. Merely because Appellants did not respond to Respondents' request for admissions, it does not negate the facts, which is the essence of the Gadsons' complaint.

[4] In *Warren v. International Brotherhood of Teamsters*, 544 F.2d 334 (8th Cir. 1976), the defendant's answers to requests for admissions were not timely, but they were filed with the court. *Id.* at 338-39. The Court concluded that this late filing of responses, in conjunction with the defendant's earlier filing of an answer that contained similar denials, was the functional equivalent of a motion to withdraw admissions under Rule 36(b). *Id.* at 339-40; In *Manatt v. Union Pac. R.R.*, 122 F.3d 514, 516-18 (8th Cir. 1997) the court affirming district court's grant of permission to withdraw or amend admission, where defendant "filed its answer" beyond the thirty days provided by Rule 36(a), because refusing the answer would not have promoted presentation of the merits and allowing untimely answer did not prejudice defendant.

[5] Essentially, the rights of discovery articulated by the rules give the attorney the means to prepare for trial. *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 651 (S.C. Ct. App. 2003). The purpose of S.C. R. C. P. 36 is to allow parties to narrow the issues and determine which facts do not need to be proven because they are admitted. *Id.* S.C. R. Civ. P. 36(a) does not condition the binding effect of requests for admissions upon whether the requests address issues asserted or denied in the pleadings. *Id.* Whether a request to admit alters the pleadings depends on the language of the particular request to admit. *Id.* However, if the language of the request for admission specifically goes to an issue in the pleadings, the admission resulting from a party's failure to respond to the request may override the pleadings. *Id.* In this case however, the Gadsons' failure to respond was only because the parties stipulated to get the case struck from the docket.

In order to avoid a deemed admission, the Appellants filed a motion to extend time to respond to Defendants' Request for Admission or in the alternative, a motion to withdraw admissions deemed admitted. The intent and the result requested were to strike the admitted responses and enable the case to be tried on its merits. In *Tuomey Regional Medical Centre. v. McIntosh*, 315 S.C. 189, 191 (1993), the court stated that under Rule 36, the Trial Court had wide discretion to permit Appellants to withdraw their deemed admissions. Rule 36 allows amendment of an admission in the discretion of the court when "the merits of the action will be sub-served thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him. . . ." Appellants contend that a Request for Admissions to which a response, objection or motion for time has not been filed before the thirty-first day should not be taken as irrevocably admitted. Necessary and practicable leniency should be given based upon the circumstances, which are beyond the control of the parties.

Significantly, if the Trial Court found that the Gadsons were not successful in prevailing upon the Trial Court that the Deemed Admissions must be withdrawn, the Trial Court did not record any reasons for denying Appellants' motion. (R. pp. 3-5). Because the Trial Court denied Appellants' motion without assigning any reasons, the Trial Court grossly erred.[6]

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[6] The purpose of Rule 36 is to outline the scope of the trial by determining the disputed issues and leaving out the issues that are not contested by the parties. The Respondents failed to show that the withdrawal would prejudice them in maintaining its action or defense on merits. No prejudice was caused to Respondents when Appellants failed to file a timely answer to their requests as Respondents had themselves agreed to get the case dismissed under Rule 40 (j). It is pertinent to note that Appellants sent an unfiled answer to Respondents' Request for Admission to the Respondents' attorney on December 6, 2010, subsequent to strike off but prior to restoration of this case to the docket. Accordingly, Respondents knew or should have known that Appellants intended to deny its requests for admission, specifically the first two requests for admissions (Defendants' Request for Admission ¶¶ 2 & 3, p. 1) as those requests required Appellants to negate allegations that formed the basis of their complaint. Therefore, a late response to their request to admit could not have prejudiced Respondents, interfered with their trial preparation, or defense on merits as they had themselves consented to strike the case off the active docket and discuss settlement (Consent motion striking case from docket, ¶ 1, p. 1). In *Herrin v. Blackman*, 89 F.R.D. 622, 624 (W.D. Tenn. 1981), the court noted that a Federal Court from the 5th Circuit, in dealing with Fed. R. Civ. P. 36 has ruled that the purpose of Rule 36 is to remove uncontested issues and to prevent delay and therefore when the issues going to the merits are contested and the late response does not cause delay of a trial or prejudice to a litigant, there is no reason to refuse a late filing.

III. Because The Trial Court Did Not Assign Any Reason For Denying Appellants' Motion to Extend Time Or In The Alternative Withdraw Deemed Admission, Summary judgment Was Inappropriate.

The Trial Court held that the Request for Admissions were deemed admitted by Appellants for not filing the answers within 30 days as required by SCRCP, Rule 36, and accordingly, it granted Respondents' Motion for Summary Judgment. (R. p. 6). Here, the deemed admissions have precluded the presentation of merits. Appellants have shown good cause for their delay in answering Respondents' Request for Admission. Specifically, Appellants did not file a timely response to Respondents' requests for admissions because at the time Respondents served the Request for Admission, both parties to this suit were contemplating withdrawing this suit pursuant to SCRCP, Rule 40(j). Respondents had propounded their Request for Admission, request for production of documents and interrogatories on April 9, 2010. It is pertinent to note that only six (6) days after the last date for filing answers, a joint motion was filed by both parties to strike this case off the docket. This case was dismissed few days after the 30 day deadline imposed by Rule 36. Effectively, Appellants did not have sufficient time to file a response to Request for Admissions or to seek extension of time limit for filing the same. However, Appellants did file a late answer to Respondents' Request for Admission on December 6, 2010, subsequent to strike off but prior to restoration of this case to the docket. Due to the underlying circumstances, Appellants did not have a reason to suspect that a failure to answer Respondents' request to admit would be detrimental to their case. (R. pp. 90-96) (R. 97—6) (R. pp. 103-113).

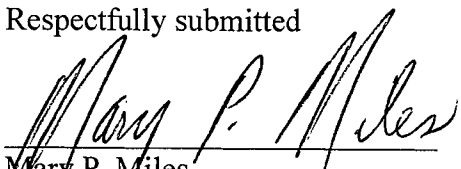
Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law."

Fed. R. Civ. P. 56(a). *McClure v. Wyeth*, 2012 U.S. Dist. LEXIS 37632 (D.S.C. 2012).[7] In deciding whether a genuine issue of material fact exists, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Because Respondents failed to establish that they would be harmed if the deemed admissions were withdrawn; because deemed admissions would sub serve justice; and because the Trial Court failed to assign any reason in its order denying Appellants' motion to extend time and or motion to withdraw deemed admissions, granting summary judgment was inappropriate.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court, and remand for further proceedings.

Respectfully submitted



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[7] It is well established that summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987).

PROOF OF SERVICE OF A NOTICE OF APPEAL

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Caroline Deloatch and Bank of America, by depositing a copy of it in the United States Mail, postage prepaid, on October 30, 2012, addressed to his attorney of record, Candace C. Jackson, Nelson Mullins Riley & Scarborough LLP, Meridian, 17th Floor, 1320 Main Street, Columbia, SC 29201, on June 19, 2012.

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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