REPLY 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 REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

CASES

I. ARGUMENTS

i. Gadsons' Alternative Argument Cannot Be A Ground For Dismissal.

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. The Gadsons contended that Ms. Deloatch assaulted Mr. Jerry Gadson causing him personal and mental injuries. The entire premise of the Gadsons' case was based on Ms. Deloatch's assault on Mr. Gadson. (R. pp. 9-19). During the discovery process, i.e., Respondents mailed to Gadsons a letter dated April 09, 2010, that included a request for admission, virtually seeking the Gadsons to admit that Ms. Deloatch never assaulted the Gadsons. (R. pp. 56-59). Before the Gadsons could respond to the request for admission, the parties had several discussions to get the case struck from the roster. Accordingly, the parties filed the motion under SCRCP 40(j) on May 17, 2010 to get the case struck from the docket. The trial court granted the parties' request on July 07, 2010, and also permitted them to continue participating in discovery while this case was struck from the docket. (R. p. 1).

In keeping with the trial court's permission, the Gadsons' responded to the Respondents' request for admission, albeit five months after the case was struck from docket. (R. pp. 78-81). Court would permit defendant to make untimely filing of answers to plaintiff's requests for admission, where plaintiff sought admission of dispositive facts of case, where plaintiff did not show that her position as to merits had been seriously prejudiced by defendant's delay, and where substantial justice would best be achieved by deeming proffered facts not admitted but rather by ordering defendant to respond to plaintiff's requests. See 93 A.L.R.2d 757 at p. 15; see also *Szatanek v. McDonnell Douglas Corp.*, 109 F.R.D. 37 (W.D. N.Y. 1985).

During the time between July 07, 2010, and on December 06, 2010 the day when the Gadsons responded to the Respondents' request for admission, the Respondents never attempted to participate in the discovery as the trial court had ordered. The Gadsons then had the case restored on March 08, 2011. (R. p. 2). In *U.S. v. Cannon*, 363 F. Supp. 1045 (D. Del. 1973), late response was treated as amendment to admissions (made by operation of law upon expiration of 30 day period) where court was satisfied that presentation of merits of action would thereby be served and that defendants would not thereby be prejudiced. See 93 A.L.R.2d 757 at p. 15.

Immediately thereafter, the Respondents filed a motion for summary judgment claiming that the Gadsons never responded to the request for admissions, which effectively meant that Ms. Deloatch never assaulted Mr. Gadsons. (R. pp. 90-96). Despite the fact that the Gadsons responded on December 06, 2010, they had never taken the trial court's permission to respond to the request for admission belatedly. In order to overcome this procedural anomaly, the Gadsons filed a motion to extend time or in the alternative withdraw the deemed admissions. (R. 114-122). In this motion, the Gadsons presented a chronology of events wherein they specifically mentioned, "On December 06, 2010, Plaintiffs send their request to admission to Defendants' attorney Candace C. Jackson." (See Motion to Extend and/or Withdraw Admissions – Chronology of events ¶6). The trial court denied this motion without assigning any reasoning, and proceeded to grant Respondents' motion for summary judgment. (R. p. 5).

In their initial brief, the Gadsons outlined their arguments, and even stated that they filed a motion to extend and/or withdraw admissions, "[i]n 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."

(See Appellant's Initial Brief at p.12). The Appellants filed this motion only counter Respondents' argument in their motion for summary judgment that Ms. Deloatch never assaulted Mr. Gadson.[1]

Generally, Court would exercise its discretion to accept late responses to requests for admissions, where opposing party failed to show prejudice, proposed responses mirrored contentions of answer, and allowing late responses would serve search for truth. See 93 A.L.R.2d 757 at p. 17; see also *White Consol. Industries, Inc. v. Waterhouse*, 158 F.R.D. 429 (D. Minn. 1994).

The request for admission procedure is perhaps the least used of the various discovery

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[1] While the rules of civil procedure provide a harsh penalty, i.e., deemed admissions, for failure to comply with requests for admissions, a trial court is still given great discretion when determining whether it will allow the untimely answers to requests for admissions. *Triangle Const. Co., Inc. v. Foshee Const. Co., Inc.*, 976 So. 2d 978 (Miss. Ct. App. 2008).

Trial court did not abuse its discretion in allowing defendants to file late answers to plaintiffs' request for admissions, where plaintiffs neither suggested any bad faith in denials of matters whose admission was sought, nor indicated that any prejudice resulted from late filing. *Coates v. U. S. Fidelity & Guar. Co.*, 525 S.W.2d 654 (Mo. Ct. App. 1975)

In personal injury action, trial court abused its discretion in refusing to accept defendant's late answers to requests for admissions, which resulted in partial summary judgment being granted to plaintiff, where there was no showing that court's acceptance of answers as timely would have prejudiced plaintiff. *Gilborges v. Wallace*, 153 N.J. Super. 121, 379 A.2d 269 (App. Div. 1977), aff'd in part, rev'd in part on other grounds, 78 N.J. 342, 396 A.2d 338 (1978).

Trial court did not abuse discretion in allowing late filing of answers to request for admissions where issues presented by requests were identical to allegations of complaint and amended complaint which were denied by defendants, where all indications prior to trial were that issues raised by requests were to be controverted at trial, and where plaintiffs suffered no prejudice by late filing. *Warren v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 544 F.2d 334, 93 L.R.R.M. (BNA) 2734 (8th Cir. 1976).

Plaintiff would be allowed to file late answers to defendant's requests for admissions where neglect of plaintiff's counsel in failing to notice and respond to requests, though not condoned, was understandable in view of fact that when requests were made procedural motion war was raging between parties; where, although opposing attorneys had numerous conversations, defendants never made inquiry of plaintiff with regard to requests; and where it would have violated sense of equity and fairness to dismiss case on procedural ground since defendants' case would not have been heard at all had it not been for vacation of default entered against them originally. 93 A.L.R.2d 757 at p. 17; see also *Marshall v. Sunshine and Leisure, Inc.*, 496 F. Supp. 354, 25 Wage & Hour Cas. (BNA) 80, 89 Lab. Cas. (CCH) ¶33934, 7 Fed. R. Evid. Serv. 1638, 31 Fed. R. Serv. 2d 765 (M.D. Fla. 1980).

When a motion seeking the withdrawal of admissions has been made, trial court must consider (1) whether the presentation of the merits will be subserved by permitting withdrawal, and (2) whether the party who obtained the admission will be prejudiced by withdrawal. Trial Procedure Rule 36. 4 AMJUR TRIALS 185; see also *Bryant v. County Council of Lake County*, 720 N.E.2d 1 (Ind. Ct. App. 1999).

devices. See 4 AMJUR TRIALS 185 at p. 4. "Oral depositions or written interrogatories directed to an opposing party are far more common. The reasons advanced for the limited use of requests for admission are varied. It has been suggested that the relatively weak sanction provision, under which a litigant who improperly refuses to admit a matter is subject only to payment of the costs incurred in proving it, is responsible. Another view is that there is confusion among lawyers concerning the proper function of the admissions procedure, as distinguished from the deposition-interrogatory machinery. Coupled with this is the fact that while most cases require investigation and thus call for use of the deposition-interrogatory machinery, there are fewer situations in which the use of requests to admit is appropriate. It is also pointed out that where obviously undisputed matters are involved, counsel in practice often reach stipulations on these matters by gentlemen's agreement or as part of the pretrial conference procedure. The judge at the pretrial conference is in an advantageous position to induce parties to stipulate out of the case factual questions that are not truly relevant or disputed. Surveys point to the fact that the request for admissions is a device employed primarily by plaintiffs." *Id.*[2]

The jurisprudence of trials, and the from the ALR citing decisions from various courts clearly elucidates that even an untimely response can be allowed if it does not prejudice the defendants. "In personal injury action against drug manufacturer, trial court did not abuse its discretion in allowing defendant's response to plaintiff's request for admission even though

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[2] Requests for admissions, although generally classified with other discovery proceedings, are not a means of ascertaining the relevant facts of the case; they are a means of ascertaining the opposing party's position with respect to these facts. See 4 AMJUR TRIALS 185 at p. 4.

African-American former employee, who brought Title VII race discrimination action against employer, would be permitted to withdraw admissions ordered by reason of employee's failure to make timely response to employer's request for admissions, even though employee did not file motion seeking relief from matters deemed admitted, where employee's response to summary judgment motion indicated that employee desired such relief and employer failed to show prejudice. Civil Rights Act of 1964, §§ 701 et seq., 42 U.S.C.A. §§ 2000e et seq.; Fed.Rules Civ.Proc.Rule 36(b), 28 U.S.C.A. *Johnson v. Outback Steakhouse of Florida, Inc.*, 328 F. Supp. 2d 1115 (D. Kan. 2004).

defendant's response was filed nine months after request was served where certain of facts contained in request to admit concerned central issue of proximate cause."[3] See 93 A.L.R.2d 757. Here, the Gadsons never admitted that they did not respond to the request to admission, because the trial court's permission was never sought by them, they filed a motion to extend time, or in the alternative sought the trial court's permission to withdraw the admission if the trial court were to find the admissions were deemed to be admitted. "Late service or filing of answers to requests has been accepted as proper under various circumstances, even though prior leave of court has not been sought." See 4 AMJUR TRIALS 185 at p. 10.

ii. The Gadsons Have Preserved Their Arguments.

Because the trial court denied the Appellants' motion to extend time and/or in the alternative amend deemed admissions in its order granting Respondent's motion for summary judgment, the Appellants have preserved their arguments. In its conclusions of law at page 5, the trial court stated as follows:

> "ORDERED that the Defendants are entitled to summary judgment as to the Plaintiffs' negligence (and/or assault and battery) and loss of consortium claims on the grounds that there is no genuine issues as to any material fact and are entitled judgment in their favor as to the Plaintiffs' claims as a matter of law. It is therefore ORDERED that the Plaintiffs' claims of negligence (and/or assault and battery) and loss of consortium claims are dismissed *with prejudice*. It is further ORDERED that Plaintiffs' Motion to Extend Time to Respond to Defendants' Request for Admission and/or Motion to Withdraw Admissions is DENIED."

The issues raised by Gadsons on appeal are threefold: (1) the trial court erred in granting summary judgment because the Gadsons did not timely respond to a request for admission; (2) the trial court erred in granting summary judgment by refusing to allow the Gadsons from withdrawing the deemed admissions; and (3) the trial court erred in denying the Gadsons' motion

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[3] Citing *Bluestein v. Upjohn Co.*, 102 Ill. App. 3d 672, (1st Dist. 1981).

to extend time or in the alternative withdraw deemed admission without assigning any reasons, and therefore, summary judgment was inappropriate.

The rule of issue preservation is based on a premise that an issue cannot be presented on appeal for the first time. *Herron v. Century BMW*, 395 S.C. 461, 465 (2011) (finding that it is "axiomatic that an issue cannot be raised for the first time on 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 Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373 (Ct.App.2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke,* 330 S.C. 71, 76 (1998). It is "axiomatic that an issue cannot be raised for the first time on appeal." *Id.* Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422 (2000). In order to preserve the issue, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. *Herron v. Century BMW*, 395 S.C. 461, 465 (2011).

In this case, the Gadsons' need not have raised the three issues in an SCRCP 59 motion because the trial court did deny their Motion to Extend Time to Respond to Defendants' Request for Admission and/or Motion to Withdraw without assigning reasons. Here, the Gadsons could not have a filed a motion under SCRCP 50 asking the trial court assign reasons for its refusal to grant time. The purpose of issue preservation is not as petty as the Respondents make it out to be, instead it should be invoked in those circumstances where a court does not rule on an issue raised by a party and not where a court has merely not assigned any reason for denying the

motion. Accordingly, Respondents have failed to establish that the Gadsons has not preserved their grounds on appeal.

iii. Respondents Still Fail To Show Sufficient Prejudice

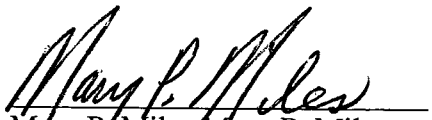
Because Respondents fail to establish that they would be sufficiently prejudiced if deemed admissions were withdrawn by the Gadsons, the trial court erred in granting summary judgment based on those allegedly deemed admissions. In their initial brief, the Gadsons argued that the trial court abused its discretion by refusing to allow them to withdraw the deemed admissions. The Gadsons again insist that mere passage of time is an insufficient reason for the Respondents to establish prejudice.

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. *See State Hwy. Dep't v. Booker,* 260 S.C. 245 (1973); *Hodge v. Myers,* 255 S.C. 542 (1971). Essentially, the rights of discovery articulated by the rules give the attorney the means to prepare for trial. Here, the trial court permitted the parties to continue the discovery process after it struck the case from the docket pursuant to Rule 40(j) on July 07, 2010. The Gadsons responded to the Respondents' request for admission on December 06, 2010. During this period, the Respondents took no action whatsoever to further the discovery proceedings. Accordingly, the Respondents cannot use their request for admission as a tool to undermine the Gadsons' effort to prove that Mr. Gadson was indeed assaulted by Ms. Deloatch.

II. 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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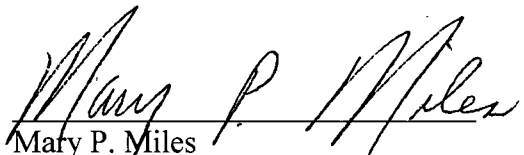
PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellant 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 October 30, 2012.

October 30, 2012



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

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