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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr, Judge

Case No. 2017-CP-04-02099
Appellate Case No. 2020-000421

John Harbin, Appellant,

v.

April Blair, Tracy Dunn, HUB Enterprises, Inc.,
Shawn Conway, Gallivan White & Boyd,
Sam Nikopoulos, and John Doe, Respondents,

AMENDED PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

Appellant John Harbin, through his undersigned counsel, respectfully submits this Petition for Rehearing and Suggestion for Rehearing En Banc regarding the Order dismissing his appeal, filed on July 20, 2022.

1. THE LOWER COURT ERRED IN DISMISSING THIS CASE BASED ON THE EXISTENCE OF EVIDENCE SUPPORTING APPELLANT'S CONTENTIONS.

This Petition relates to the finding of this Court that a dismissal was warranted in the underlying action. It is the Court's belief Appellant did not show a breach of contract. Based on defense counsel's actions, Appellant was cheated out of at least $100,000.00 from a settlement offer extended by Defendant Blair. Unfortunately, Appellant's counsel was not privy to the clandestine work of defense counsel, along with Defendants' April Blair (Blair) and Tracy Dunn

(Dunn). Because of the aforementioned efforts, Appellant's counsel was unable to properly evaluate the "strength" of Respondents' case. The failure of counsel to know Respondents had struck a deal for their testimony (RA, Affidavit of Lewis Tillman, p.325), made the choice of pursuing litigation a fatal error. This constituted a breach of contract for the unknowing plaintiff, who relied on his deficiently knowledgeable attorney (as it related to the discussions behind closed doors) to advise him on the likelihood of success with his choice. As a result of his counsel's ignorance of the quid pro agreement between Blair and Dunn, Appellant ultimately made a mortally erroneous choice.

The defense and the Court are of the belief Appellant, in bringing this action, was attempting to relitigate the previous case involving his shooting. They contend the purpose of the underlying action was to merely embarrass, cause delay or impede his opponents. Appellant is of the belief he never got a fair trial in the first place. Why should he believe he had his day in court, when the testimony was rigged?

Blair had brought a CDV High and Aggravated against Dunn for, in part, pointing a gun at her face. Dunn was immediately arrested for that event. Following his arrest, he was charged with violating the probation he was on for shooting Appellant. They had both been sued by Appellant. The bond conditions for Dunn included no contact with the victim (Blair). However, Blair used her defense counsel to communicate with Dunn. The communication prevented Appellant from getting competent representation from his counsel.

Appellant believes the previously offered affidavit prevents a directed verdict. The affidavit was from Dunn's cousin who was jailed with him at the time it was made. They were jailed together at the time defense counsel met with Dunn to broker the deal for his testimony. Dunn was told Blair would drop the CDV High and Aggravated if he would take full

responsibility for the shooting. The credibility of his statement is best seen by the fact he authored the affidavit four months prior to Blair (through her counsel) recognizing the greatness of Dunn; and how he was like a father to her child. At that hearing, she told the Court in no uncertain terms she wanted the case dismissed. He was sentenced as a result of the probation violation.

Appellant had a credible affidavit indicating his trial had been fixed. The Lower Court and the Court of Appeals found Respondents were deserving of a dismissal when Appellant offered an affidavit which provided a scintilla of evidence (at the very least) against the dismissal prayer. According to the 3rd Restatement of Torts, this was sufficient to illustrate tortious interference with a contract.

The Restatement (Third) of Torts, §§ 16-17, sets out the elements of the intentional interference with a contract. It defines what conduct creates liability:

> (1) A defendant is subject to liability for interference with contract if:
>
> > (a) a valid contract existed between the plaintiff and a third party;
> > (b) the defendant engaged in wrongful conduct as defined in Subsection (2);
> > (c) the defendant intended to cause a breach of the plaintiff's contract or disruption of its performance; and
> > (d) the defendant's wrongful conduct caused a breach of the contract or disruption of performance.
>
> (2) Conduct is wrongful for purposes of this Section if:
>
> > (a) the defendant acted for the purpose of appropriating the benefits of the plaintiff's contract; or
> > (b) the defendant's conduct constituted an independent and intentional legal wrong; or
> > (c) the defendant engaged in the conduct for the sole purpose of injuring the plaintiff.

(Restatement (Third) of Torts: Liability for Economic Harm § 16).

The act by defense counsel of relaying the quid pro quo agreement between Blair and Dunn had one purpose. The intent was to interfere with the performance of the contract by the

undersigned. The South Carolina Supreme Court long ago addressed the tortious nature of such an act:

> The theory of this doctrine is that the parties to a contract have a property right therein, which a third person has no more right maliciously to deprive them of, or injure them in, that he would have to injure their property. Such an injury without sufficient justification, amounts to a tort for which the injured party may seek compensation by an action in tort for damages.

Chitwood v. McMillan, 189 S.C. 262, 1 S.E.2d 162 (1939).

Appellant had a property right in his suit for damages related to being shot. While Respondents and their counsel had the right to deprive him of same, they were not allowed to maliciously deprive him of it. Appellant's opponents in this matter did exactly that when they, according to an independent, credible affiant, conspired to produce certain testimony to free Blair from liability in the shooting of Appellant.

Perhaps, Appellant's counsel is mistaken in believing bargaining for testimony is conduct which, "constituted an independent and intentional legal wrong". This evidence was not transparent to Appellant and his counsel; and it had a direct bearing on the decisions made in the case. Based on what appears to be a clear indication of intentional interference with a contract, Appellant should be able to pursue his trial against Respondents.

2. APPELLANT'S COUNSEL WAS WRONGFULLY SANCTIONED FOR INSTITUTING A VIABLE ACTION.

According to Black's Law Dictionary, frivolous means an answer or plea which "is clearly insufficient on its face, and does not controvert the materials points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass". Appellant seeks knowledge of what embarrassment he may have caused Respondents when Dunn's family member was the affiant who spoke of the quid pro quo agreement.

The undersigned is having great difficulty understanding the rulings of the Court with regard to the lawsuits filed in this action. In first case, defense made an offer of judgment which was declined by Appellant. Following the defense verdict, defense counsel sought costs from Appellant. Included in the costs were fees for a private investigator who allegedly did his work after Appellant's deposition had been taken. Thus, the private investigator and his work would have been discoverable due to the ongoing nature of discovery requests. The undersigned learned of the witness and his production ***at the time defense counsel filed his motion for costs.***

Defense counsel had violated the rules of discovery by withholding a witness and his work. However, he had the audacity to request fees related to both. The Court signed the Order granting the fees; and denied the Motion to Reconsider. The Court rewarded defense counsel and his firm for violating the rules of discovery. Of course, the Court in that trial found defense counsel's fostering and facilitation of bartering for testimony was not objectionable. Trying to explain to a client how rules are made to be broken, when speaking of the rules governing the hallowed grounds of the courthouse, is impossible.

The Court also took time out to discuss another case in which sanctions were assessed against the undersigned. Sadly, neither the Lower Court nor this Court did any fact checking.

> The Court is particularly concerned with the filing of this action given that Smith was previously sanctioned by this Court in 2016 for similar conduct. See Feb. 6, 2016 Order, *Gregg Battersby v. J. Kirkman Moorhead, Krause, Moorhead & Draisen, P.A.*, Allstate Insurance Company, and Allstate Northbrook Indemnity Company, C.A. No. 2015-CP-04-00667. In that case, Smith brought a complaint alleging that attorneys were liable to the plaintiff for damages arising out of the attorneys' representation of their client. The Honorable R. Lawton McIntosh found that no reasonable attorney would have brought the plaintiff's claims and awarded attorneys' fees and costs for defending the lawsuit and bringing the motion for sanctions.

The *Battersby* case had an outstanding Motion to Reconsider at the time the Court used it for the purpose of illustrating a prior bad act by the undersigned. An actual order was never issued following the issuance of the Form 4, despite the Court's directive to prepare an order. The Court issued a judgment against the undersigned in 2020, after prodding by the defendants in that matter.

In the *Battersby* "case", three (3) different suits arose out of the facts. In the first case, the LLR was sued over the lack of due process in taking Dr. Battersby's chiropractic license. Two women had accused him of exposing himself while at his home/office for treatment. He was charged with indecent exposure for both women. He was put on interim suspension.

One of the women had treated with him for a wreck. His bill was excessive as it relates to this area. It was approximately $12,000.00. The attorney representing her was dealing with Allstate for this soft-tissue case. The attorney settled the claim for $15,000.00, with the attorney, client and hospital, dividing the settlement equally.

The undersigned sued women for defamation and the attorney for failing to address the lien of Dr. Battersby. The suit was brought in advance of the aforementioned attorney and another attorney filing suit against Dr. Battersby for the allegations the women brought against him. The individual who had been in the wreck told the process server she was "not the only one. There were other guys involved." In the attorney's answer to our suit, he said the bill wasn't paid because of the doctor's alleged actions.

The other woman was deposed and offered the fact she went to Dr. Battersby for no reason. She traveled 30 minutes to his office without acute injury. She allegedly went based on the advice of the lady involved in the accident. In her deposition, she testified she went four (4) times before he exposed himself. She had already retained the attorney related to the first

attorney. He filed a complaint with the LLR for her to corroborate the story of the wreck victim. Recognizing the limited visits made it look like she was simply a plant, the attorney said she had been there twenty (20) times. The attorney took her out of the room and spoke to her. She never altered her story. He did not state anything to the contrary. He did not "fire" his client for lying. It was apparent he willfully and wantonly promoted a fictitious event for financial gain.

Dr. Battersby had a prior issue in Ohio with similar facts. Following a jury trial, the plaintiff was awarded $2,000,000.00 in damages. When the second woman was deposed, she admitted she had read about Dr. Battersby's difficulties outside of South Carolina on her attorney's coffee table. The woman did not have Lexus or Westlaw, so her knowledge of Ohio could only have come from her attorney. The attorneys would be seeking monies much like the attorney in Ohio. The second attorney was sued for giving faulty information on the LLR complaint, and conspiracy for fostering and facilitating the fraud against the doctor, who lost two (2) years of his career, as well as having his name dragged through the mud.

The Court refused to allow Dr. Battersby to bring the cases together, despite the cases possessing the same facts and cast of characters. On a day when six (6) hearings were conducted, the Court ruled against my client and me in every single motion. He dismissed all of the attorneys. He did that despite following a meeting with her attorney, the second woman's story changed from Dr. Battersby wearing a robe when he answered the door (in the incident report) to answering the door in a towel (when the detective showed up to interview her ten (10) days later). In addition, there was no sexual facts relayed in the incident report. In the meeting with detectives, she said he put his junk on her back.

Following the Court issuing orders resulting in six losses for my client and me (and my son who was going to enter law school in the fall), the undersigned was summoned to the grand

jury room to see the judge. Upon arrival, I was frisked by Al Pierce, an Anderson County sheriff, who was a bailiff at the courthouse. I had gone through the metal detector upon my entrance of the courthouse. Following my frisking, the judge asked me if I knew why I lost. To my negative response, I was told, "because you sued attorneys". Following my client parting ways with me, he tried the case against the woman for the chiropractic bill and defamation. A jury awarded him $112,000.00. The Anderson County people spoke and recognized the conspiracy.

The judge found that no one could see the conspiracy and my action was frivolous. Once again, the defense rested on the fact you can't sue an attorney for doing his job. However, the first attorney failed to pay the chiropractic bill. The second attorney used false facts to bolster on"sanctioned" for their conduct. The undersigned was assessed $12,000.00 in fees for the firm of second attorney. He got paid to create facts with which to hurt my client's life.

The attorney in this case was the middle-man in a conspiracy to fix a trial's testimony. I had an affidavit from an independent witness. The Court mentioned the Office of Disciplinary Counsel and said he would not report an attorney. He threw out the facts presented in the affidavit He assessed fees of $13,000.00 against me.

CONCLUSION

Based on my logical deduction, it is apparent the vast similarities in these cases means I am the one who is the basis for the sanctions granted against me. The Courts who have reviewed these cases have penalized me for doing my job-zealously advocating for my clients. It seems as though the Court's would rather kick me than to address the nefarious activities of the attorneys involved. I would ask anyone to tell me how to explain to my clients how this conduct, and these results, can go on in this great "system". The rulings made in this matter

should be reversed to give the Appellant a belief attorneys are not invincible if they cheat.

s/Donald L. Smith
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Attorney for Appellant

Hilton Head, South Carolina
August 6, 2022.

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FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr, Judge

Case No. 2017-CP-04-02099
Appellate Case No. 2020-000421.

John Harbin, Appellant,

v.

April Blair, Tracy Dunn, HUB Enterprises, Inc.,
Shawn Conway, Gallivan White & Boyd,
Sam Nikopoulos, and John Doe, Respondents,

PROOF OF SERVICE

Pursuant to Supreme Court of South Carolina's Amended Order 2020-05-29-02, I certify that I have served a copy of Appellant's Motion to Allow Late Filing of Amended Petition for Rehearing and Amended Petition for Rehearing and Suggestion for Rehearing En Banc on HUB and Conway and GWB Respondents respectively, and Proof of Service, upon The Honorable Jenny Abbott Kitchings, Clerk of South Carolina Court of Appeals via the OneDrive Business of AIS, and the Respondents, by and through their respective counsel of record, via their respective email addresses as follows:

Ms. Jenny Abbott-Kitchings ctappfilings@sccourts.org

Attorneys for Defendants Gallivan White & Boyd, PA and Sam Nikopoulos:

Mr. Alfred Johnston Cox, Esquire jcox@gwblawfirm.com
Ms. Jessica W. Laffitte, Esquire jlaffitte@gwblawfirm.com
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The above-mentioned documents have been served on August 6, 2022.

s/Donald L. Smith

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Hilton Head, South Carolina
August 6, 2022.

FORM 8
LETTER TO THE COURT OF APPEALS CLERK OF COURT FOR FILING OF APPELLANT'S MOTION TO ALLOW LATE FILING OF HIS AMENDED PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

August 6, 2022

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: John Harbin v. April Blair, Tracy Dunn, HUB Enterprises, Inc., Shawn Conway, Gallivan White & Boyd, Sam Nikopolous, and John Doe
C.A. No. 2017-CP-04-02099
Appellate Case No. 2020-000421

Dear Ms. Kitchings:

Please find enclosed Appellant's:

1. Motion to Allow Late Filing of Amended Petition for Rehearing and Suggestion for Rehearing En Banc.

2. Amended Petition for Rehearing and Suggestion for Rehearing En Banc.

3. Form 7-Certificate of Service to HUB and Shawn Conway and GWB Respondents respectively, and Proof of Service of same.

Sincerely,

s/Donald L. Smith
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Mr. Steven J. Pugh, Esquire

Mr. James P. Walsh, Esquire
Mr. Tracy Dunn