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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

R. Lawton McIntosh, Judge

Case No. 2015-CP-04-00667
Appellate Case No. 2020-000070

Ex Parte: Donald L. Smith,
In Re: Greg Battersby,

Appellant,
Plaintiff

v.

J. Kirkman Moorehead, Krause, Moorhead & Draisen, P. A.,

Respondents.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Pursuant to SCACR Rule 22 (a) and SCACR Rule 240(i), Appellant Donald L. Smith, respectfully petitions this Court for a Rehearing of Opinion No. 2022-UP-331, filed August 10, 2022. Appellant respectfully submits the Court overlooked or misapprehended his arguments and evidence. (Kennedy v. S.C. Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001), Rehearing is warranted when the Court has overlooked or misapprehended an argument.). In support of this Petition for Rehearing, the attention of this Honorable Court is directed to material points of fact and law that were seemingly overlooked in the Appeal.

SUMMARY OF ARGUMENT

This Honorable Court affirmed the trial court's levy of sanctions against the undersigned. In doing so, the abuse of discretion that is the sanction of $12,000.00 continues unfettered.

The South Carolina Frivolous Civil Proceedings Sanctions Act found in Section 15-36-10 of the South Carolina Code of Laws speaks directly regarding what must exist for sanctions to be issued. The very first thing which needs to be addressed is the term frivolous. 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". The following is what the trial court allegedly based the order of sanctions

> (a) filing a frivolous pleading, motion, or document if:
>
> > (i) the person has **not read the frivolous pleading**, motion, or document;
> >
> > (ii) **a reasonable attorney** in the same circumstances **would believe** that under the facts, **his claim** or defense **was clearly not warranted** under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
> >
> > (iii) a **reasonable attorney** presented with the same circumstances would **believe that** the procurement, **initiation**, continuation, or defense of a **civil cause was intended merely to harass** or injure the other party; or
> >
> > (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous**, interposed for merely delay**, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;

The undersigned will now list the *facts* which formed the basis of the original Complaint, the Amended Complaint and the Second Amended Complaint. There were four (4) actions filed on behalf of the Plaintiff which all related to the parties and the facts and circumstances supporting the justification of the pleadings. It should be noted the attorneys who were sued in the pleadings for which sanctions were assessed were not sued in the original complaint. The attorneys were sued after discovery began with depositions.

The original was filed against the two women who had brought charges against the Plaintiff for indecent exposure. I began my representation of him as a result of the charges. I was the second defense attorney he had employed. Ironically, the first one was hesitant about the civil action(s) Plaintiff wanted to institute following the dismissal/not guilty verdict for the charges that had been brought. Upon taking the case, any recorded interviews which had been taken were demanded. The result of the request was a recorded interview Jan Morton had given to the detectives investigating her case.

She had gone to the Sheriff's Office to make a police report ten (10) days before. During the interview with he two detectives, Morton admitted to having spoken to her attorney. "I had talked to Mr. – I can't think of his name. Moore – Moorhead, Mr. Moorhead. He had told me to talk with her and I just –" (RA, p. 327; 15.18). This ties into what Neal said to the process server, Michael Moske, upon getting served with the original complaint. 'I'm not the only one. There are other guys." (RA, p. 207).

When Ms. Morton was deposed her testimony was vastly different from the facts gleaned from the incident report. She alleged Plaintiff had called incessantly after the incident to seek her return to treatment. Morton's phone records failed to illustrate any calls from Plaintiff to Morton. She also contradicted her allegations from her interview to her deposition by saying he had put his "junk" on her back at the office. In the incident report, she had gone out of her way to nullify any thought he had sexually, or attempted to sexually, assaulted her.

In Ms. Morton's interview, she spouted off a great deal of knowledge regarding Dr. Battersby. She told them his practice specialized in pediatric care. She told them his license had been suspended. She told them he had issues in Arizona. She told them she had a file on Dr. Battersby. (RA, p. 324.336; 6.23).

In her deposition, she was asked whether her attorney had provided her with the research. She stated, "He didn't provide me with anything. I just saw it." (RA, p. 335, 1.2). The defense attached exhibits to its Answer and Counterclaim. The first was to be cited as *State v. Battersby,* 2008-Ohio-836. (RA, p. 372.373). In that case, Plaintiff was alleged to have exposed himself in his home to a potential maid. That occurred in June of 2006. (*Id.)* The undersigned also attached another case from Ohio. In this 1994 case relating to sexual harassment, a jury awarded the plaintiff $2.45 million dollars against Plaintiff. (RA, p. 406.447).

When she was pressed on whether Moorhead had provided her with research, she unflinchingly said, "I have never done research on Dr. Battersby." (RA, p. 336; 11.13). When asked again whether the materials she allegedly read at Moorhead's office, were in fact research, she struggled to say, "I didn't do that. I didn't – I don't –" (RA, p. 336; 20). If she didn't do the research, and she read it in Moorhead's office, he is the only one who could have done the research.

In Morton's deposition, it was brought out that she had only been to his four times when he allegedly exposed himself. However, during her deposition when being examined regarding her LLR complaint against the Plaintiff, she stated her counsel had completed the document and had stated she had visited twenty (20) times. Her counsel, Moorhead, took her out of the deposition and returned a short time later. At no time, did he disassociate himself with Morton; he did not put on the record she was wrong for stating he had put 20 visits; he did not get in touch with the LLR to amend the complaint; etc. He took ownership of the faulty complaint and did not want anything to do with changing it.

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.

CONCLUSION

Based upon the foregoing, Appellant requests this Honorable Court to provide for rehearing or an en banc review of the lower court's imposition of the monetary sanction against herein Appellant. All that was offered in this paper were facts-no speculation, no surmise, not conjecture…

s/Donald L. Smith
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Pro Se

Anderson, South Carolina
August 23, 2022.

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FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
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R. Lawton McIntosh, Judge

Case No. 2015-CP-04-00667
Appellate Case No. 2020-000070

Ex Parte: Donald L. Smith,
In Re: Greg Battersby,

Appellant,
Plaintiff

v.

J. Kirkman Moorehead, Krause, Moorhead & Draisen, P. A.,

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 the Certificate of Technical Difficulties, Adobe Error, Petition for Rehearing of Appellant, Form 8, and Form 7-Proof of Service of same, upon The Honorable Jenny Abbott Kitchings, Clerk of South Carolina Court of Appeals, through the AIS, and the Respondents, by and through their respective counsel of record, via electronic mail in the addresses as follows:

Ms. Jenny Abbott-Kitchings	ctappfilings@sccourts.org
<u>Attorney for Respondents</u>	
Mr. Steven M. Krause, Esquire	steve@krauselaw.org
Mr. Daniel I. Draisen, Esquire	daniel@injuredSC.com
Mr. Kirkman Moorhead, Esquire	kirk@mllawyers.com

The above-mentioned documents have been served on August 23, 2022.

s/Donald L. Smith

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Anderson, South Carolina
August 23, 2022.

FORM 8
COVER LETTER TO THE CLERK OF COURT FOR THE COURT OF APPEALS FOR APPELLANT'S PETITION FOR REHEARING

August 23, 2022

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
1220 Senate Street,
Columbia SC 29201

RE: Donald L. Smith v. J. Kirkman Moorhead, Krause, Moorhead & Draisen, P.A.
(In relation to Gregg Battersby v. J. Kirkman Moorhead, et al. C.A. No. 2015-CP-04-00667)

Dear Honorable Kitchings:

Please find enclosed the following documents for filing:

1. Petition for Rehearing;
2. Certificate of Technical Difficulties
3. "Adobe Error"
4. Form 8; and,
5. Form 7.

Sincerely,

s/Donald L. Smith
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Attorney for Appellant

Cc: Mr. Steven M. Krause, Esquire
Mr. Daniel L. Draisen, Esquire
Mr. Kirkman Moorhead, Esquire