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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HAMPTON COUNTY

Court of Common Pleas

Walter H. Sanders, Jr., Special Referee

Case No. 2023-001001

Donald Youngblood,……...Respondent,

v.

Sheila Wright,...……...……...Appellant.

FINAL BRIEF OF APPELLANT

Respectfully submitted,

/s/F. Truett Nettles, II
F. Truett Nettles, II, Esq.
Rosen Hagood, LLC
40 Calhoun Street, Suite 450
Charleston, SC 29401
(843) 266-8122
tnettles@rosenhagood.com
Attorney for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. DID THE SPECIAL REFEREE ERR IN FINDING THAT A PORTION OF THE APPELLANT'S AFFIDAVIT IN SUPPORT OF THE MOTION TO SET ASIDE DEFAULT WAS "HEARSAY" AND IN FINDING THAT THE APPELLANT DID NOT HAVE "GOOD CAUSE" TO SET ASIDE THE DEFAULT IN LIGHT OF THE OFFER OF A REASONABLE EXPLANATION AND THE ALLEGATION THAT GRANTING THE RELIEF WOULD NOT THWART THE INTERESTS OF JUSTICE.

2. DID THE SPECIAL REFEREEE ERR IN FINDING THAT THE RESPONDENT SUFFERED A "PERMANENT" INJURY IN PHYSICAL LIMITATION WHEN THAT MEDICAL OPINION WAS NOT SUPPORTED BY EXPERT EVIDENCE AND WAS OUTSIDE THE COMMON KNOWLEDGE AND EXPERIENCE OF THE RESPONDENT TESTIFYING.

STATEMENT OF THE CASE

On January 25, 2022, the Respondent Donald Youngblood filed a Summons and Complaint in the Hampton County Court of Pleas alleging personal injuries which resulted from a slip and fall accident in the Appellant's front yard (R. pp. 002-004). The Summons and Complaint was served on the Respondent on January 29, 2022 (R. p. 005). No responsive pleading was filed by the Appellant within 30 days of the service of process.

On July 21, 2022, legal counsel for Respondent sent the copy of the Summons and Complaint to the Appellant's homeowner insurance company advising that the case was in default (R. p. 006). That insurance company retained the current attorney for the Appellant and there were settlement communications between the two lawyers. During the fall months of 2022. No legal documents were filed with the Hampton County Clerk of Court.

On January 13, 2023, almost one year after the case was filed, the Respondent's attorney filed an Affidavit of Default with the Clerk of Court (R. pp. 009-010). On January 18, 2023, the Chief Administrative Judge for the Hampton County Court of Common Pleas issued an entry and Order of Default (R. pp. 011-013). On January 20, 2023, the Clerk of Court issued an Order of Reference and appointment of a Special Referee (R. pp. 014-016).

On March 24, 2023, legal counsel for the Appellant filed an Affidavit and a Motion to Set Aside the Order of Default with the Hampton County Court of Common Pleas (R. pp. 017-024). Since the case had already been referred to a Special Referee, the trial court in Hampton County directed that the Motion to Set Aside Default be heard by the Special Referee.

A hearing was held before Walter H. Sanders, Jr., Special Referee, on May 2, 2023, at the offices of the Special Referee in Fairfax, South Carolina. By order dated May 31, 2023, the Special Referee denied the Appellants Motion to Set Aside the Default (R. pp. 025-030). In that same order, the Special Referee issued judgement against the Appellant in the amount of $632.773.80, based solely on the testimony of the Respondent (R. pp. 025-030).

The Appellant filed a Notice of Appeal with the Circuit Court and with this South Carolina Court of Appeals on June 16, 2023. There was no transcript of the hearing before the Special Referee. At the request of the Appellant, with the consent of the Respondent, an extension of time to file the initial brief was granted by the court and the deadline was established as August 18, 2023.

STANDARD OF REVIEW

"In an action at law, tried without a jury, the Appellate Court standard of review extends only to the correction of errors of law." Okatie River, L.L.C. v. Se. Site Prep, L.L.C. 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct.App.2003). "Determining the proper interpretation of a statute is a question law…." Callawassie Island Members Club, Inc. v. Dennis, 435 S.C. 193, 821 S.E.2d 667 "An appellate court may decide questions of law with no particular deference to the trial court." Gantt v. Selph, 423 S.C. 333, 814 S.E.2d 523 (2018). This case involves the interpretation and application of Rule 55(c) SCRCP by the Special Referee and reliance upon lay testimony to find that the Respondent suffered a "permanent" injury without the benefit of any expert, medical opinion.

FACTS

On April 4, 2020, the Respondent visited the home of the Appellant. While walking across the grassy front yard, the Respondent accidently stepped in a hole and fell to the ground. The Respondent testified that he suffered injuries in that slip and fall.

On April 15, 2020, ten days after the slip and fall accident, the Respondent was seen at the Colleton Medical Center in Walterboro, South Carolina. He received x-rays and pain medication. After further radiologic studies and examination by an orthopedic surgeon, the Respondent had arthroscopic surgery to repair the rotator cuff in his shoulder on September 3, 2020. In the months of September and October 2020, the Respondent had physical therapy for the shoulder and rotator cuff repair. The Respondent was out of work for several weeks following the surgery.

ARGUMENTS

I. THE AFFIDAVIT OFFERED IN SUPPORT OF THE APPELLANT'S MOTION TO SET ASIDE THE DEFAULT CONTAINED REFERENCES TO THE BUSINESS RECORDS OF THE APPELLANT'S INSURANCE COMPANY AND WAS NOT "HEARSAY" AND THE APPELLANT DID PROVIDE THE SPECIAL REFEREE WITH AN EXPLANATION OF HOW THE DEFAULT OCCURRED AND REASONS WHY VACATION OF THE DEFAULT WOULD SERVE THE INTERESTS OF JUSTICE.

The affidavit offered in support of the Appellant's Motion to Set Aside the Default contained references to the business records of the Appellant's homeowner insurance company (R. pp. 017-019). The Special Referee stated that a portion of the affidavit describing and explaining the service of process on the Appellant and the insurance company's receipt of a copy of the Summons and Complaint months later were "hearsay" evidence.

Paragraphs 1, 3 and 4 of the affidavit make reference to the business records of the Appellant's homeowner insurance company. Rule 803(6), SCRE provides that business records are an exception to the hearsay rule. It is part of the regularly conducted business of a homeowner insurance company to keep a record of all communications and activities on a particular claim. The insurance company in this case provided the Appellant's lawyer with a record of claim activity to be used in litigation of this case (R. pp. 007-008). At the hearing before the Special Referee, there was no evidence or argument offered by the Respondent that this information was not part of the business records of the Appellant's insurance company.

In paragraph 5 of the affidavit, the Appellant's attorney states that the Defendant's homeowner's insurance company was in the process of changing its electronic claim management system at the time the Appellant made a telephone call to the company. That information was based on personal knowledge of the affiant based on his experience with this insurance company in other cases and the affiant's own investigation as to why the claim was inactive for the 4 months. These

portions of the affidavit were offered in support of the Motion to Set Aside the Default. These sworn statements merely explain how the delay occurred. The statements were based on business records of the insurance company and personal knowledge of the Affidavit.

The Special Referee correctly quotes South Carolina law: "The good cause standard of Rule 55(c) requires, as a threshold burden, a party to put forth 'an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice'" Limehouse v. Hulsey, 397 S.C. 49, 70, 723 S.E.2d 211, 222 (Ct.App.2011); citing Sundown Operating Co. v. Intedge Indus. Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888, (2009). As South Carolina cases have stated many times, Rule 55(c), SCRCP is less strenuous than the standard to vacate a default judgment under Rule 60, SCRCP. In fact, the South Carolina Supreme Court has stated that proof of any one of the factors set forth in Rule 60, SCRCP would be sufficient to show "good cause" under Rule 55(c), SCRCP. *id.* at 889. A simple "explanation" for how the default occurred should be sufficient. In this case, the Appellant showed the Special Referee how the default occurred and there was a logical explanation on how this happened. In other words, the reason for the default does not have to be justifiable or excusable, it simply has to be an explanation of how the default occurred.

As the Appellant argued in the Motion to Set Aside Default, a good faith mistake together with no attempt to "thwart justice" is a sufficient basis to set aside a default. Columbia Pools Inc. v. Galvin, 288 S.C. 59, 399 S.E2d 524 (Ct.App.1986). This Appellant Court has famously ruled that a mere mis-calendaring of a hearing date by a party's lawyer has been found to be a good faith error and a basis to set aside a default. Mictronics Inc. v. South Carolina Department of Revenue, 345 S.C. 506, 548 S.E.2d 223 (Ct.App.2001).

The Special Referee went further in his decision to discuss the factors enumerated in Wham v. Shearson Lehman and Bros., 298 S.C. 462, 381 S.E.2d 499 (Ct.App.1989). Having offered a reasonable explanation for how the default occurred, the Wham case sets forth 3 other factors to be considered:

1. Timing of the Motion for Relief;
2. Whether the Defendant has a meritorious defense; and
3. The degree of prejudice, if any, to the Plaintiff.

As stated in the Affidavit supporting the Motion, the Respondent's attorney did not provide notice of the Motion and Order of Default to Appellant's attorney, despite communications between the two attorneys about the case. When the Appellant's attorney learned of the Motion and Order for Default and Order of Reference, the Motion to Set Aside the Default was filed within 30 days.

Further, as the Appellant argued in the Motion to Set Aside the Order of Default, there are issues that could be explored and developed in a full litigation of this matter. Those potentially meritorious defenses would include the status of the Respondent at the time of the slip and fall (invitee vs. licensee), prior notice of the front yard conditions to the Respondent; comparative negligence and an admission of carelessness by the Respondent (R. pp. 023-024). Setting aside the Order of Default and allowing the parties to conduct discovery and even a Motion for Summary Judgement would be consistent with the purposes of our judicial system. Finally, the Respondent did not offer any suggestion that he would suffer prejudice if the Appellant were allowed to answer the complaint, raise defenses, and conduct discovery and pre-trial motions. The Respondent offered no circumstances of a deceased witness, destroyed evidence or other events which might

prejudice the Respondent's prosecution of his claim. The Respondent himself waited a year after serving the Appellant before he moved for default.

> "The touchstone here is good cause, a standard designed to excuse honest, harmless human mistakes so a case may be judged on its merits rather than its missteps." Jordan v. Hartford Financial Group, Inc., 535 S.C., 868 S.E.2d 400 (Ct.App.2021).

The Appellant believes that the rules of civil procedure are not, and should not be, a series of snares and traps. Rather, the purpose of the rules is to have an orderly administration of our judicial system and give all parties a far opportunity to present their case.

II. THE SPECIAL REFEREE ERRED IN FINDING THAT THE PLAINTIFF/RESPONDENT SUFFERED "PERMANENT" INJURIES AND PHYSICAL LIMITATIONS BECAUSE THERE WAS NO EXPERT MEDICAL OPINION PROUDCED AT THE DAMAGES HEARING AND THE DURATION OF THE PLAINTIFF/RESPONDENT INJURY OR LIMITATION IS A MATTER OUTSIDE THE COMMON KNOWLEDGE AND EXPERIENCE OF THE PLAINTIFF/RESPONDENT, HIS ATTORNEY OR THE SPECIAL REFEREE.

A damages hearing was held on May 2, 2023, in the law office of the Special Referee Walter H. Sanders, Jr., Esquire in Fairfax, South Carolina The only party testifying and offering any evidence was the Respondent.

On page 3 of the Order of the Special Referee, there was a finding that the Plaintiff suffered "permanent" injuries to his neck and shoulder (R. p. 027). The Respondent testified that he was 58 years old at the time of hearing. Legal counsel for the Respondent urged the Special Referee to take notice of SC Code Ann. Section 19-1-150 (1976) which indicated an average life expectancy for the Respondent to be 22 years. In paragraph 12 on page 4 of the Order, the Special Referee stated that his verdict of $632,773.80 was based on the Respondent's "life expectancy, his significant injuries and his limitations from the injuries…" (R. p. 028).

Other than the testimony of the Respondent, whose business is construction of home improvements, the only other evidence is offered is Plaintiff's Exhibit #1 (R. pp. 031-048). That exhibit contains 18 pages of medical bills of the Respondent from his doctors, Colleton Medical Center, physical therapists, and radiology/laboratory charges. The total medical bills incurred by the Respondent following the slip and fall accident is $68,773.80.

The Plaintiff's Exhibit #1 does not include any diagnosis, findings, operative notes, prognosis following surgery or a discharge summary. In other words, the only medical evidence offered by the Respondent was the dollar amount of medical bills for various services. Nowhere in the Plaintiff's Exhibit #1 does the word "permanent" appear.

Whether or not an injury and subsequent surgery will result in a "permanent condition or limitation" is a matter which is outside the common knowledge and experience of most lay persons. Spartanburg Regional Medical Center v. Bulsa, 308 S.C. 322, 417 S.E.2d 648 (Ct.App.1992); citing Armstrong v. Union Carbide 308 S.C. 235, 417 S.E.2d 597 (Ct.App.1992) "The general rule in South Carolina is that where a subject is beyond the common knowledge of the jury, expert testimony is required." Babb v. Lee County Landfill SC, LLC, 405 S.C. 129, 747 S.E.2d 468 (2013). None of the persons present at the damages hearing are qualified medical experts.

In addition to the case law in South Carolina, Rule 701 South Carolina Rules of Evidence require that the testimony of a lay witness is limited to those opinions or inferences which … "do not require special knowledge, skill, experience or training." The Respondent testified that he understood his injuries and limitations to be permanent. However, the source of that medical opinion would be hearsay, unless an expert medical witness is introduced, qualified and testified for the Respondent. There is no competent medical evidence of a "permanent" injury in this case.

CONCLUSION

The Affidavit of the Appellant's attorney offered in support of her Motion to Set Aside the Default is not hearsay. The statements of the Appellant's attorney are not offered to prove the truth of the matter asserted. The Affidavit was offered to explain the delay in responsive pleadings. The Special Referee did not apply the standards set forth in South Carolina case law regarding Rule 55(c), SCRCP. The award of $632.773.80 by the Special Referee was based on a finding of "permanent" injury and physical limitation. That finding was not supported by expert evidence. This Court should reverse the rulings of the Special Referee and remand this case to the Court of Common Pleas for a full development of the facts and a just and proper judgment.

January 18, 2024

Respectfully submitted,

/s/ F. Truett Nettles, II
F. Truett Nettles, II, Esq.
Rosen Hagood, LLC
40 Calhoun Street, Suite 450
Charleston, SC 29401 SC Bar# 4195
(843) 266-8122
SC Bar# 4195
tnettles@rosenhagood.com
Attorney for the Appellant

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CERTIFICATE OF SERVICE

I certify that I have served the Final Brief of Appellant on Donald Youngblood by sending a copy via e-mail, on January 18, 2024, to his attorneys of record John E. Parker, Jr. and John E. Parker, at their email addresses jparker@parkerlawgroupsc.com and jayparker@parkerlawgroupsc.com.

Respectfully submitted,

January 18, 2023

Karen Nissen, Paralegal to
F. Truett Nettles, II
Rosen Hagood, LLC
40 Calhoun Street, Suite 450
Charleston, SC 29401
(843) 266-8122
tnettles@rosenhagood.com
Attorney for the Appellant

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ROSEN | HAGOOD

F. TRUETT NETTLES, II, OF COUNSEL
Email: tnettles@rosenhagood.com
Direct dial: (843)266-8122

January 18, 2024

FOR ELECTRONIC FILING VIA EMAIL (ctappfilings@sccourts.org):
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Donald Youngblood vs. Sheila Wright
Appellate Case No.: 2023-001001

Dear Ms. Kitchings:

On behalf of Appellant Sheila Wright, please find enclosed for filing the following:

1. Final Brief of Appellant with Proof of Service; and
2. Final Reply Brief of Appellant with Proof of Service.

We would greatly appreciate your filing these on our behalf and returning a date-stamped copy to us.

With best regards, I am

Sincerely,

/s/ F. Truett Nettles, II

F. Truett Nettles, II

FTN/kn
Enclosures
cc: John E. Parker, Esq. (via email w/ encls.)
Jay Parker, Esq. (via email w/ encls.)